Supreme Court, U.S.
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No. 98- —

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES J. CANNON &
WILLIAM L. BLAGG,

Petitioners,

v.

LAWRENCE G. WILLIAMS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR WRIT OF CERTIORARI

ROBERT B. MANN
MANN & MITCHELL
501 Turks Head Place
Providence, RI 02903
(401) 351-5770

CARTER G. PHILLIPS*
MARK E. HADDAD
BRIAN C. KALT
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

December 10, 1998

**Counsel of Record*

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QUESTION PRESENTED

Whether a court of appeals has jurisdiction to hear an appeal, arising out of a sanctions hearing, from an attorney who is the subject of a judicial rebuke embodied in explicit and published findings of misconduct, regardless of whether there is an accompanying monetary sanction, or of whether the rebuke is explicitly labeled a "reprimand."

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the decision below (App. 1a) contains the names of all of the parties. To petitioners' knowledge, no party is incorporated, has issued shares to the public, or has any subsidiary or parent companies.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Charles J. Cannon and William L. Blagg respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The order of the *en banc* court of appeals (App. 35a-38a) is reported at 158 F.3d 50. The opinion of the court of appeals (App. 1a-34a) is reported at 156 F.3d 86. The opinion of the district court (App. 39a-68a) is reported at 215 B.R. 289. The October 24, 1995 decision of the bankruptcy court (App. 69a-87a) is reported at 188 B.R. 721. The April 14, 1995 decision of the bankruptcy court (App. 88a-100a) is reported at 181 B.R. 1.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1998. App. 1a. The order of the court of appeals denying the petition for rehearing and suggestion for rehearing *en banc* was entered on October 16, 1998. App. 35a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The bankruptcy appellate jurisdiction statute provides, in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 158(d).

The general appellate jurisdiction statute provides, in pertinent part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

28 U.S.C. § 1291.

STATEMENT OF THE CASE

This case presents an issue of fundamental importance: the right of an attorney who has been publicly rebuked by a court to obtain appellate review of that determination. In the decision below, the First Circuit held that it lacked jurisdiction to review the lower courts' published, explicit findings of attorney misconduct, chastising the attorneys by

name. It ruled that petitioners could not appeal because the rebuke was not explicitly labeled a "reprimand," and because the accompanying monetary sanctions had been vacated.

In so holding, the circuit, itself deeply divided on the question of appealability, acknowledged a split among the other circuits that have considered this question. On one side are the First and Seventh Circuits, which have held that appeals from such published findings of attorney misconduct are not permitted. On the other side are the Second, Fifth, and District of Columbia Circuits, which allow such appeals. This Court should resolve this conflict on an issue of profound importance to the legal profession.

Factual Background

Petitioner Charles J. Cannon is a trial attorney in the Tax Division of the United States Department of Justice in Washington, D.C. He previously represented the United States in an adversary proceeding connected to the bankruptcy petition of Lawrence Williams. App. 3a, 93a. Petitioner William L. Blagg is a Treasury Department attorney who, for part of the period relevant to this case, worked for the IRS District Counsel in Manhattan. Blagg aided the IRS in gathering documents for discovery in the Williams case, but he did not represent the government in that case. App. 4a, 78a, 93a.

This case concerns sanctions stemming from a discovery request Williams made in the adversary proceeding. The April 1991 request primarily sought documents relating to Williams' individual tax returns and IRS audits of them. App. 42a. A second category of documents—relating to IRS audits of tax returns filed by partnerships in which Williams invested ("partnership audit files")—were not mentioned in the production request, but figured prominently in the

controversy that followed. App. 63a-64a. Over Cannon's objections, the bankruptcy court issued an order in January 1992, compelling production of the documents requested by Williams. App. 43a. This order made no mention of the partnership audit files. App. 43a, 63a. In May, Williams filed a motion for preclusion against the United States, alleging that the government had failed to produce the partnership audit files. App. 45a.

Cannon then informally agreed to give Williams' attorney access to the partnership audit files, as well as any other non-privileged documents Williams' attorney might ask Cannon to produce. App. 47a-48a. Cannon asked Blagg, who was working on other cases in the Tax Court that involved the same partnerships, to collect the partnership audit files for inspection by Williams' attorney. App. 48a. After reviewing the partnership audit files at Blagg's office in November, Williams' attorney asked Cannon for a third category of documents—relating to settlement negotiations by other IRS attorneys in litigation involving other partners from the same partnerships—which was neither mentioned in the discovery request nor discussed with Cannon. App. 48a-49a, 93a-94a. Cannon forwarded this request to Blagg. Blagg concluded that these documents were not relevant, and wrote a letter telling Cannon that he was unaware of any documents in this third category that would be relevant to Williams' case. App. 49a. Cannon misconstrued this as a statement that no such documents existed, and proceeded accordingly.

Bankruptcy and District Court Proceedings

The bankruptcy court held its evidentiary hearing on Williams' motion three years later, in January 1995.[1] App. 45a. Both sides, in their proposed pre-hearing orders, agreed that the government was the party at risk of being sanctioned at this hearing. App. 46a. There was no indication, either prior to the hearing or during it, that Cannon or Blagg might face individual sanctions.

In a decision and order dated April 14, 1995, the bankruptcy court denied Williams' motion for preclusion or a default judgment, but ordered the government to pay Williams' costs and attorneys' fees. App. 97a. In addition, the court personally sanctioned Cannon and Blagg with:

(1) a fine of $750 each, payable to the court;

(2) an injunction forbidding them to seek reimbursement of their fines from their employer, the government; and

(3) a published opinion harshly and repeatedly reprimanding them by name.

App. 98a.

The bankruptcy court concluded that Cannon's conduct revealed "his disdain for the Federal and Bankruptcy Rules of Procedure, his adversaries, and Courts alike." App. 97a. It assessed Cannon's "performance and credibility" at the same level as that of Blagg, App. 97a, whose conduct the court found "intentional, unprofessional, and unjustified," and whose explanations the court classified as "pure baloney."

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[1] Williams' motion to preclude had been repeatedly continued at the parties' request while they engaged in settlement negotiations. App. 45a.

App. 94a. The court ruled that, together, the two men had "repeatedly and deliberately violated Rule 37(b)," in an effort "specifically calculated to impede Plaintiff's attempts to obtain discovery material to which it was clearly entitled." App. 91a, 96a-97a. These conclusions were premised on specific factual charges that had never been suggested prior to the hearing. The court further opined that "[i]t is as though the IRS never heard of response/objection deadlines, the Federal Rules of Civil Procedure, or the Rules of Bankruptcy Procedure." App. 75a. Finally, the court ordered the $750 fines in order to "discourage these and other government agents from engaging in 'big brother' abuses." App. 97a.

Cannon and Blagg filed a motion to alter or amend the court's order, along with affidavits in which they rebutted all of the court's serious charges by explaining their conduct. App. 51a. On October 24, 1995, the bankruptcy court granted appellants' motion in part, amending some inaccurate statements. App. 75a-76a. It refused to consider the affidavits, however, and left the bulk of its findings in place. App. 75a.

The court made some legal adjustments to its order of sanctions. It completely vacated its fine against Blagg in response to his argument that, because he had never formally appeared in the case, the court lacked personal jurisdiction over him to impose monetary sanctions. App. 78a. The court also determined that it should not have fined Cannon directly, and ordered that Cannon instead be responsible for contributing $750 toward the attorneys' fees award imposed on the government. App. 86a.

Despite vacating Blagg's fine, the court explicitly ordered that "the findings and conclusions regarding Mr. Blagg's conduct and demeanor remain intact." App. 78a. Similarly, in response to Cannon and Blagg's request (by then moot) that

the decision be published without using their names, the court reaffirmed its findings and conclusions and cited a First Circuit case that endorsed the use of attorneys' names in published opinions as a permissible form of sanction for their misconduct. App. 82a (citing *United States* v. *Horn*, 29 F.3d 754, 758 n.1 (1st Cir. 1994)).

Because the court refused to remove its findings of misconduct as to both attorneys and the monetary sanction on Cannon, Cannon and Blagg appealed to the district court. That court issued its opinion and order on November 5, 1997. App. 39a.

The district court began by finding that it had appellate jurisdiction over the challenge to these reprimands. The court recognized that "there is a point where judicial criticism turns to operate as a serious sanction," and that "an overly harsh or unfounded published reprimand may warrant appellate review in some circumstances." App. 54a. The court then rejected petitioners' argument that they had been denied the fair notice of the possibility of sanctions against them, and the corresponding opportunity to defend themselves, that due process requires. App. 61a.

The district court divided the sanctions into two parts for its consideration: a "monetary sanction" (against Cannon), and a "public reprimand" (against both attorneys). App. 62a, 65a. It treated both as actual sanctions, reviewing them for abuse of discretion and seeking to determine if the lower court "had the authority to sanction the attorneys as it did." App. 62a. Applying this standard, the district court vacated the monetary sanction against Cannon, recognizing that the partnership audit files had not been included in the bankruptcy court's Rule 37(b) order, and thus that Cannon had not violated the court's order. App. 63a-64a.

Regarding the reprimands, however, the court held that, even absent the violation of a court order, the bankruptcy court had the inherent power to discipline attorneys in this manner:

> When confronted with conduct which is not sanctionable by particular discovery rules, courts have other means of redressing abusive or opprobrious discovery practices. . . . Publishing specific findings of bad faith is but one remedy the bankruptcy court had available.

App. 65a-66a. After supplementing the record with its own findings of fact, the district court concluded "that the record facts justify the bankruptcy court's finding of bad faith," and accordingly found "no error either in the choice or the severity of the sanction imposed." App. 47a-48a, 65a-67a. The district court therefore expressly refused to vacate the bankruptcy court's published findings of bad faith misconduct by Cannon and Blagg. App. 67a.

Court of Appeals Proceedings

Cannon and Blagg each appealed to the First Circuit, arguing that they never received notice and a fair opportunity to defend against the sanctions, and that the district court had engaged in improper appellate factfinding. The court of appeals, however, did not reach the merits. On September 11, 1998, the court instead held, in a split decision, that it had no jurisdiction to review "published findings of attorney misconduct." App. 2a.

The majority began its opinion by noting that its "sister circuits are divided on this important question." App. 2a. It largely adopted the approach outlined in the Seventh Circuit's decision in *Bolte* v. *Home Ins. Co.*, 744 F.2d 572, 573 (7th

Cir. 1984), and held that bare findings of misconduct are reviewable through mandamus only, not appeal. See App. 14a. In doing so, it expressly rejected the more expansive jurisdictional approach followed by the Fifth Circuit in *Walker* v. *City of Mesquite*, 129 F.3d 831 (5th Cir. 1997). App. 14a n.6.

The majority acknowledged that "the bankruptcy court's findings were both explicit and unflattering, and [that] the appellants understandably take issue with the court's depiction of their conduct." App. 7a. Nevertheless, citing *Bolte*, the majority held that once the monetary sanctions were removed, there was no longer an adverse "decision, judgment, order, [or] decree" for Cannon or Blagg to appeal. App. 7a, 11a. The appropriate remedy for such cases, the majority held, was mandamus. App. 14a (citing *Bolte*). The court observed, however, that mandamus is reserved for "rare cases" that raise issues regarding "the limits of judicial power" rather than just error (however clear or palpable), and expressed its "doubt that mandamus is proper here . . . ." App. 15a.[2]

The bulk of the majority's opinion was devoted to "considerations of practice and policy." App. 12a. Concerned about line drawing, the majority rejected the Fifth Circuit's approach, and held that reprimands must be

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[2] Cannon and Blagg nevertheless filed a protective petition for a writ of mandamus after the court of appeals denied the suggestion for rehearing *en banc*. Because mandamus is only available if an ordinary appeal does not provide a remedy, the mandamus petition is being held in abeyance by the court of appeals pending the disposition of this petition for certiorari. *See Moses H. Cone Memorial Hosp.* v. *Mercury Const. Corp.*, 460 U.S. 1, 8 n.6 (1983). This protective filing was necessary due to the time limits on filing for mandamus. *See In re United States*, 348 F.2d 624, 626 (1st Cir. 1965) (expressing time limit for filing mandamus petitions); *In re United Shoe Machinery Corp.*, 276 F.2d 77, 79 (1st Cir. 1960) (same).

explicitly labeled as such and styled as an order before they can be considered appealable. App. 13a-14a & n.6. The problem with the alternative approach, it held, was that "any rule that purports to transform harsh judicial words into a '*de facto* sanction' will be almost impossible to cabin." App. 10a. It worried further that there was no principled basis for allowing attorneys to appeal written rebukes without also allowing "'witnesses, victorious parties, victims, [and] bystanders'" to appeal as well, presaging "'a breathtaking expansion in appellate jurisdiction.'" App. 11a (quoting *Bolte*, 744 F.2d at 573). The majority also was concerned that "[i]f chastened attorneys can enlist appellate courts to act as some sort of civility police, . . . trial judges are more likely to refrain from speaking and writing candidly." App. 10a.

On one point, however, the majority decided that the Seventh Circuit's approach was too restrictive. Where the Seventh Circuit had held that only monetary sanctions were appealable, the majority held instead that some "[w]ords alone" could be appealed, so long as "they are expressly identified as a reprimand." App. 13a.

This thorough majority opinion was matched by an equally thorough dissent that rejected the Seventh Circuit precedent in favor of the Fifth, District of Columbia, and Federal Circuits' approach. App. 24a-25a. While "mindful that every pejorative expression or criticism by a court of a lawyer is not subject to appeal," the dissent argued that "a public reprimand of an attorney in a published opinion which is specifically intended as punishment for misconduct stands in a different category." App. 23a. The dissent pointed out that this Court has recognized that chastising an attorney in a published opinion is an acceptable form of sanction for rules violations. App. 23a; see *Bank of Nova Scotia* v. *United*

States, 487 U.S. 250, 263 (1988) (noting that, in order to punish a knowing violation of a rule, "[t]he court may also chastise the prosecutor in a published opinion"); *United States* v. *Hasting*, 461 U.S. 499, 506 & n.5 (1983) (noting approvingly the deterrent effect on rules violations of "publicly chastis[ing] the prosecutor by identifying him in [an] opinion").

Rejecting the money/words distinction, the dissent noted that attorneys have a keen financial interest in these appeals, since "linguistic sanctions . . . can pierce the heart and the reputation of the lawyer at whom they are aimed, and, in the long run, probably will strike the lawyer's bank account as well." App. 24a. For this last point, it noted the authority of several circuits that are lined up unanimously against the Seventh Circuit approach. App. 24a-25a & n.12 (citing *Walker* v. *City of Mesquite*, 129 F.3d 831 (5th Cir. 1997); *Fromson* v. *Citiplate, Inc.*, 886 F.3d 1300, 1304 (Fed. Cir. 1989); *Sullivan* v. *Committee on Admissions & Grievances*, 395 F.2d 954, 956 (D.C. Cir. 1968); and, as contrary authority, *Bolte*).

The dissent also responded to the majority's worries about line-drawing by showing how this particular case reveals the existence of clear and sensible distinctions. To take one example cited by the dissent, the bankruptcy court leveled the reprimands in this case in order to "punish and deter," and did so after a three-day sanctions hearing; this was not merely stray commentary from the bench. App. 26a-27a. As for the problem of chilling judicial speech, the dissent noted that its preferred rule—allowing appeals from deliberate and published findings—still provides trial judges with

> broad, unappealable authority and the whole vocabulary to make pejorative comments or

> criticisms of a lawyer's performance without engaging in *deliberate or published* chastisement.

App. 27a (emphasis added). Furthermore, the dissent noted, the lower courts' statements and treatment of the reprimand in this case made it clear that this was an "unequivocal sanction," and "an ultimate statement of censure, intended to punish counsel." App. 22a, 27a. Because "no action from the censuree is required to make [the sanction] effective," the dissent concluded, the majority was requiring a label that "adds no operative substance." App. 22a.

The dissent raised a policy concern of its own, noting that under the majority's rule, a judge can "escape appellate review of an unfounded or intemperate censure merely by refraining from labeling the public reprimand as an order or decree." App. 29a. Finally, the dissent noted that mandamus is a "slender reed on which to lean for appellate review," and disagreed with the majority's and the Seventh Circuit's assessment of it as an adequate remedy. App. 30a.

Cannon and Blagg filed a suggestion for rehearing *en banc*. Deadlocked by a 3-3 vote,[3] the full court let the panel's ruling stand. App. 35a-36a. A published dissent acknowledged the "forceful and significant" policy concerns on the panel majority's side, but adopted the panel dissenter's

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[3] The original panel included a senior judge and a judge from another circuit (the dissenter), neither of whom were eligible to vote on the suggestion for rehearing *en banc*. Interestingly, then, five of the nine judges faced with the jurisdictional question in this case—the district court, the dissenter, and three members of the *en banc* court—concluded that jurisdiction was appropriate, while four judges—the panel majority and two other members of the *en banc* court—concluded otherwise.

counterarguments[4] and sided with the Fifth Circuit's approach to this "question of exceptional importance." App. 36a-37a.

REASONS FOR GRANTING THE PETITION

The issue presented in this case is one of vital importance to every attorney in the United States, and particularly to those who have occasion to practice in the First and Seventh Circuits. If allowed to stand, the decision below would preclude attorneys from seeking review of career-threatening judicial determinations of misconduct, simply because those determinations are not accompanied by a fine or formally branded as a "reprimand."

There are two compelling reasons for this Court to grant the petition. First, at least three circuits allow attorneys in such situations to appeal. Unlike the court below, none of these circuits draws a distinction between monetary and non-monetary sanctions, and none of them limits appeals only to those reprimands explicitly labeled as such. The court below noted and rejected these circuits' holdings, joining the Seventh Circuit in tightly restricting jurisdiction. This Court should resolve this deep and acknowledged circuit split.

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[4] The dissent from denial of rehearing *en banc* added one argument not registered by the panel dissent. In response to the panel majority's claim that finding jurisdiction to hear these cases would "prompt a flood of new appeals," the *en banc* dissent noted that appeals would tend to be relatively worthy cases, since an appellate affirmance would give a reprimand "far more force," leading attorneys to appeal "only in cases in which the sanction is particularly damaging to a lawyer's reputation and particularly undeserved." App. 38a. For instance, in this case, as noted before the panel below, the Department of Justice's Office of Professional Responsibility later concluded, after an investigation, that the bankruptcy court's findings against Cannon were "unsubstantiated." *Cannon Court of Appeals Brief*, addend. B.

Second, the issue in this case critically affects most judges and attorneys in federal courts today. Published, adverse findings of fact regarding professional misconduct, unaccompanied by a fine or by the formal label of "sanction," while not routine, are not uncommon, and their consequences are profound. The courts that have considered this question have therefore expressly acknowledged its importance.

This case presents a particularly good opportunity for the Court to review this issue, and not only because the decision below comprehensively examines the relevant issues. Appeals of sanctions (including some that are universally considered appealable) are often non-adversarial, unopposed proceedings.[5] As a result, decisions by courts of appeals rejecting jurisdiction will tend to be the only ones that aggrieve an interested party, and by extension will be the only ones that generate a petition to this Court. Therefore, even if this Court were inclined to resolve the circuit split by restricting jurisdiction, a petition in a case like the present one is likely to be its only vehicle for doing so.

I.

For the majority of the panel below, allowing an appeal in the absence of "a formal reprimand" would have adverse policy consequences and would violate the "abecedarian rule

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[5] In this case the debtor in the underlying proceeding has not participated in any of the appellate proceedings. The panel's opinion relies upon the *ex parte* nature of the proceedings as a reason to restrict jurisdiction. App. 11a. On rehearing petitioners urged the court of appeals to follow this Court's practice of appointing a distinguished practitioner to serve as *amicus curiae* in support of the judgment. Because rehearing was denied that suggestion became moot. Petitioners would welcome such an appointment in this case in the event this Court grants the petition for certiorari.

that federal appellate courts review decisions, judgments, orders, and decrees—not opinions, factual findings, reasoning, or explanations." App. 7a, 11a. But as the dissenting judge recognized, distinguishing between formal reprimands on one hand and published orders making findings of bad faith and unprofessional conduct by named attorneys on the other, "exalts form over substance." App. 29a. Such written findings operate as a self-executing reprimand without need for any further order. Because they are written and published, they presumably reflect the considered, deliberate judgment of the court, and not the need to react spontaneously to maintain courtroom order. These written, considered, and published reprimands therefore have considerable force. A necessary concomitant of the judicial power to choose to reprimand an attorney, in this public and enduring way, is the right of the attorney to have these findings, and the process by which they were arrived at, reviewed on appeal.

It is thus not surprising that, as evident from the panel opinion below, the split among the circuits is acknowledged and profound. Several circuits have allowed attorneys to appeal findings of misconduct, regardless of how the findings are labeled or whether they are accompanied by a fine. Other circuits, including the court below, have taken a more restrictive view of their jurisdiction. Additionally, there are subtle but important distinctions within each side of this divide.

As the court below recognized, the Seventh and Fifth Circuits provided the most thorough analysis of these questions, prior to the decision below.

The Seventh Circuit has taken the most restrictive view of any court toward appellate jurisdiction in these cases. In *Bolte* v. *Home Ins. Co.*, 744 F.2d 572 (7th Cir. 1984) (Posner, J.), the Seventh Circuit held that a finding of

"reprehensible" conduct, while "a sanction of sorts," did not rise to the level of a fine or a jailing. *Id.* at 573. As a result, it did not constitute a "decision" for the purposes of 28 U.S.C. § 1291, "especially in an age of congested appellate dockets." *Id.* at 573. Instead, the court held, mandamus was the appropriate remedy. *Id.* As a result, in the Seventh Circuit, it is clear that "an attorney may not appeal from an order that finds misconduct but does not result in monetary liability, despite the potential reputational effects," because such effects do not constitute "an existing controversy." *Clark Equipment Co.* v. *Lift Parts Mfg. Co.*, 972 F.2d 817, 820 (7th Cir. 1992) (explaining and following *Bolte*). This rejection of jurisdiction over any non-monetary sanctions renders the Seventh Circuit's approach even more restrictive than that of the First Circuit below.

Before the present case arose, it appeared that the Seventh Circuit would remain isolated, and its approach would be ignored by the other circuits. The Fifth Circuit explicitly rejected the Seventh Circuit's restrictive analysis in *Walker* v. *City of Mesquite*, 129 F.3d 831 (5th Cir. 1997), where an attorney appealed an unpublished finding that he had violated his obligation of candor.[6] The appellees argued that the lower court's failure to issue any sanction (other than the presence of the unpublished opinion) meant that there was no Article III case or controversy on appeal. In support of this argument, the appellees cited the Seventh Circuit's precedent requiring monetary damages as a prerequisite for appellate

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[6] As in this case, the district court in *Walker* did not enter a formal reprimand labeled as such. Rather, the "formal order" referenced in the court of appeals' opinion, *Walker*, 129 F.3d at 832, was similar to the bankruptcy court's second order in this case—it withdrew some findings of fact, let others stand, and entered no formal sanction. *See Brief for United States as Amicus Curiae in Support of Rehearing En Banc* at 7 & n.3.

jurisdiction. *Id.* at 832 & n.2. The court spurned these arguments, saying:

> Stripped to [its] essentials this proposition would maintain that an attorney has more of a reason and interest in appealing the imposition of a $100 fine than appealing a finding and declaration by a court that counsel is an unprofessional lawyer prone to engage in blatant misconduct. We reject this proposition out of hand, being persuaded beyond peradventure that one's professional reputation is a lawyer's most important and valuable asset. . . .
>
> . . . We therefore conclude and hold that the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct.

Id. at 832-33. The Fifth Circuit has since followed *Walker* in permitting an attorney to appeal a disbarment order even after she was reinstated, because of the reputational effects of the outstanding opinion. See *Dailey* v. *Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir. 1998); *id.* at 231 n.1 (Smith, J., dissenting).[7]

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[7] The Fifth Circuit had earlier assumed that it had such jurisdiction without explicitly analyzing the issue. In *Dawson* v. *United States*, 68 F.3d 886 (5th Cir. 1995), the district court reprimanded two lawyers and ordered one of them to take an ethics course. *Id.* at 894. The court of appeals accepted both lawyers' appeals. Even after reversing the ultimate finding of misconduct on technical grounds, the court went on to consider the underlying findings of fact criticizing the lawyers, "because of the serious cloud on their professional reputations caused, not only by [the ultimate] finding, but by the findings upon which it was based." *Id.* at 895. The court concluded that the district court had abused its discretion, and held that the

Other circuits had previously come to the same conclusion as the Fifth Circuit, though without analyzing the question in quite as much depth, and without considering the adverse precedent of the Seventh Circuit. The Second Circuit presented a broad view of appellate jurisdiction to review published findings of misconduct, in *Penthouse Int'l, Ltd.* v. *Playboy Enterp., Inc.*, 663 F.2d 371 (2d Cir. 1981). In that case, the district court had dismissed a lawsuit and condemned the conduct of trial counsel. Allowing the attorney to intervene and appeal, the court of appeals held that the "findings of . . . willful misrepresentation to the court" by the attorney necessitated "a thorough review of the record . . . to determine whether there was any error or abuse of discretion on the part of the district court." *Id.* at 373. The court found that there was not. *Id.* at 391-92.

The Federal Circuit applied the Second Circuit view in *Fromson* v. *Citiplate*, 886 F.2d 1300 (Fed. Cir. 1989), where it allowed an attorney to appeal from an opinion that incidentally "commented unfavorably" on his conduct without including monetary sanctions.[8] *Id.* at 1301, 1304. The court characterized the chastisement, which it upheld, as "a sanction (albeit non-monetary)," rather than merely as "a finding." *Id.* at 1304.

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factual findings of improper conduct were clearly erroneous. *Id.* at 898.

[8] To reach this result, the Federal Circuit had to distinguish its earlier decision in *Sun-Tek Indust.* v. *Kennedy Sky Lites, Inc.*, 856 F.2d 173, 174-75 (Fed. Cir. 1988), where the court refused to allow an appeal of a finding of fact. The defendant in *Sun-Tek* had suffered an adverse result on the merits, but wished to appeal only the finding that its attorney had violated a court order. *Fromson* distinguished *Sun-Tek* on the grounds that the attorney in *Sun-Tek* was not the appellant. *Fromson*, 886 F.2d at 1304; *see also Warner Bros Inc.* v. *Dae Rim Trading, Inc.*, 877 F.2d 1120, 1127 (2d Cir. 1989); *DeLuca* v. *Long Island Lighting Co.*, 862 F.2d 427, 429 (2d Cir. 1988).

An earlier view, and one that closely parallels the Fifth Circuit approach, was adopted by the District of Columbia Circuit, in *Sullivan* v. *Committee on Admissions and Grievances*, 395 F.2d 954 (D.C. Cir. 1968). In *Sullivan*, the court reviewed a panel decision that had found ethical violations by an attorney but decided to dismiss the charges against him. *Id.* at 956. Responding to a challenge to the appellant's standing, the court of appeals wrote:

> [T]he District Court has determined that Appellant was guilty of proscribed conduct and this determination plainly reflects adversely on his professional reputation. In a sense Appellant's posture is not unlike that of an accused who is found guilty but with [his] penalties suspended. We conclude this gives him standing to appeal.

Id. This opinion was authored by then-Judge Burger, and thus foreshadowed this Court's recognition in *United States* v. *Hasting*, 461 U.S. 499, 506 n.5 (1983) (Burger, C.J.), that mentioning an attorney by name in a published opinion recounting his misdeeds is an acceptable and effective form of sanction.

The First Circuit's resolution of the present case reflects this split of authority and underscores the need for a uniform rule. There is no question but that if this case had arisen in the Fifth Circuit, petitioners would have had the right, under *Walker*, to appeal the published findings of blatant misconduct. The same would be true if this case had arisen in the Second Circuit, and is likely true in other circuits as well.[9] The ability to obtain judicial review of a published

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[9] At least one other court of appeals has exercised jurisdiction to determine whether findings of misconduct should be attributed to an attorney by name in a published opinion. *See In re Levine*, 832 F.2d 1265 (11th Cir.

opinion condemning "a lawyer's most important and valuable asset," *Walker*, 129 F.3d at 832, should not depend on the geographic location of the federal court that issued the opinion. This Court should grant this petition and provide a single rule.

II.

The issue presented here is one of fundamental importance. Its significance has been recognized by courts on both sides of the circuit split, and by organizations representing tens of thousands of attorneys. Not only have there been numerous cases in the courts of appeals dealing with this question, but also the issue casts a long shadow, influencing the environment in every federal courtroom and the relations between judges and lawyers.

In general, the right to appeal an adverse ruling stands as "a fundamental element of procedural fairness as generally understood in this country." ABA Comm. on Standards of Judicial Admin., *Standards Relating to Appellate Courts* § 3.10 cmt. at 18 (1994). Therefore, although the right to an appeal is not mandated by the Constitution, its contours are of paramount significance.

In this particular context—reviewing findings of attorney misconduct and the fairness of the process by which those findings were reached—the availability of appellate review is especially crucial. Although the court of appeals below was

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1987), *aff'g without opinion* 675 F. Supp. 1312 (M.D. Fla. 1986) (publicly reprimanding attorney but withholding publication pending appellate affirmance). The Eleventh Circuit apparently disagrees with the Seventh, since *Levine* did not involve a monetary sanction, but given that the sanction in *Levine* was formally labeled as a reprimand, it is not certain that the Eleventh Circuit would have exercised jurisdiction in the present case.

divided on the jurisdictional issue, the judges agreed that the jurisdictional issue was an "important question," (App. 2a), and one "of exceptional importance," (App. 36a). The Fifth Circuit has recognized the "strong interest in hearing cases such as this," *Walker*, 129 F.3d at 833 n.5, while the Seventh Circuit has concluded that federal courts have a very strong interest in *not* hearing cases such as this, *Bolte*, 744 F.2d at 573. To the courts that have addressed this issue, then, this is not just a disagreement, but a disagreement of consequence.

The vigorous involvement of *amici* below provides further evidence of the importance of this question. The United States filed an *amicus* brief in support of rehearing en banc, asserting that

> the Government has a strong interest in ensuring that when the professional reputation of one of its attorneys is harmed by a public judicial rebuke, as in this case, the attorney be entitled to seek appellate review of the lower court's decision to issue such a censure.

Brief for United States as Amicus Curiae in Support of Rehearing En Banc at 4.[10] In addition, even before the question of appellate jurisdiction arose, the Federal Bar Association submitted an *amicus* brief on behalf of its 15,000 members, urging the panel below to review this case carefully to promote "strict adherence to proper [disciplinary] procedures." *Brief for FBA as Amicus Curiae* at 1-2. Another *amicus curiae* addressing the panel below, the

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[10] The United States also filed an *amicus* brief before the panel below, in support of Cannon and Blagg's due process arguments. In addition, as cited below, the Federal Bar Association (FBA) and the National Association of Assistant United States Attorneys (NAAUSA) filed separate *amicus* briefs before the panel, as well as a joint brief in support of the rehearing petition.

National Association of Assistant United States Attorneys (NAAUSA), decried the lack of "appropriate safeguards" underlying the lower courts' decisions. *Brief for NAAUSA as Amicus Curiae* at 1.[11] That problem was inherently exacerbated by the court of appeals' later refusal to review the case.

Many others have recognized the seriousness of the appearance of findings of attorney misconduct in a published opinion. This Court has pointedly omitted the name of an attorney against whom a finding of improper behavior was made, simultaneously noting that the district court could have responded to the malfeasance by identifying the lawyer in its opinion. *Hasting*, 461 U.S. at 502, 506 n.5. Other courts have done the same, while recognizing the significant deterrent effect of "[a] reprimand in a published opinion." *United States* v. *Modica*, 663 F.2d 1173, 1185 & n.7 (2d Cir. 1981); see *United States* v. *Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992) (characterizing a published opinion chastising an attorney by name as a "serious sanction"); *cf. Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 413 (1990) (Stevens, J., concurring in part and dissenting in part) (describing attorneys' professional reputations as their "most precious asset"). Furthermore, with the prevalence of computerized databases such as Westlaw and Lexis, even so-called "unpublished" opinions are instantly available to any judge, fellow practitioner, client, or potential employer searching for information on the named attorney.

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[11] The NAAUSA brief also noted that the lower courts' reprimand, appearing as it did in a published opinion, was seen as significant by (among others) the *Wall Street Journal*. *See* Tom Herman, *Judge Fines Two U.S. Lawyers, Setting Off Alarms in Washington*, Wall St. J., May 8, 1995, at B3.

The power of published reprimands has been widely recognized. See, *e.g.*, *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 263 (1988); *Hasting*, 461 U.S. at 506 & n.5; Katherine M. Lasher, Comment, *A Call for a Uniform Standard of Professional Responsibility in the Federal Court System*, 66 U. Cin. L. Rev. 901, 921 (1998) ("Because all attorneys are likely to be protective of their reputations . . . public reprimands in federal court are an effective means to regulate any misconduct."); *cf.* Andrew L. Kaufman, *Judicial Ethics*, 64 Wash. L. Rev. 851, 864 (1989) ("Judges ought to be careful that they not abuse their power. Public criticism of a lawyer in an opinion . . . may destroy or severely damage a lawyer's reputation."). In doing so, commentators also have recognized the importance of proper *review* of such reprimands. As one commentator explained:

> The impact of a public reprimand on the record at trial or, more significantly, in a published opinion, should not be underestimated. . . . At the same time, however, there is a serious risk of unfairness in the practice . . . . [A] public rebuke may be unfair in that . . . [the lawyer] will generally be unable to obtain review of the district court's finding.

Bruce A. Green, *Policing Federal Prosecutors*, 8 St. Thomas L. Rev. 69, 81-82 (1995). Another, commenting on the rebuke of former prosecutor Scott Turow in *United States* v. *Ofshe*, 817 F.2d 1508, 1516 n.6 (11th Cir. 1987), noted:

> without access to a reviewing tribunal, Turow's professional reputation is impugned . . . . In effect, [the court] sat as a grand jury, voted a true bill, and Turow, without a trial forum, will be forever presumed guilty.

H. Richard Uviller, *Presumed Guilty: The Court of Appeals Versus Scott Turow*, 136 U. Pa. L. Rev. 1879, 1901 (1988); see also 15A Wright *et al.*, *Federal Practice & Proce ure* § 3902.1 (2d ed. 1992) (characterizing *Bolte* as a "dubious decision").

Furthermore, the question of how to review findings of attorney misconduct is important because it colors conduct in federal courtrooms and the daily relations between judges and attorneys. As the court below recognized:

> A trial judge has the obligation to assure the proper conduct of proceedings in his or her court, and must retain the ability to comment, sternly when necessary, on a lawyer's performance without wondering whether those comments will provoke an appeal.

App. 12a-13a (citations omitted); see *Quercia* v. *United States*, 289 U.S. 466, 469 (1933). Federal judges deserve clear guidance on this issue. A rule that made it clear, for example, that a court's published findings of attorney misconduct are appealable, while unpublished comments made in the courtroom are not, would usefully clarify the nature and consequences of the alternative means available to federal judges for responding to and punishing attorney misconduct.

Similarly, given that a lawyer's professional reputation can be destroyed by a single published finding of misconduct, the substantive and procedural standards attendant to review of such findings are of great moment to the federal bar. Uncertainty as to these standards has the potential to chill zealous representation, making it important to develop fair and uniform rules for publicly reprimanding attorneys.

Such standards can be developed most effectively through appellate review. Thus, by providing for appellate review of published findings of attorney misconduct, this Court would enable the appellate courts to provide vitally needed guidance to the bench and the bar as to the norms of appropriate professional conduct, and the procedures to be used in determining whether violations have occurred.

* * * *

The fate of professional reputations and careers, the orderly conduct of litigation and trials, and the need to ensure procedural fairness are all implicated here, and the split among the circuits leaves these vital concerns unsettled. This Court should resolve this important question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT B. MANN
MANN & MITCHELL
501 Turks Head Place
Providence, RI 02903
(401) 351-5770

CARTER G. PHILLIPS*
MARK E. HADDAD
BRIAN C. KALT
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

December 10, 1998

*Counsel of Record

APPENDICES

APPENDIX A

In re Lawrence G. WILLIAMS, Debtor.

Lawrence G. WILLIAMS,
Plaintiff, Appellee,

v.

UNITED STATES of America
Defendant, Appellee.

William L. Blagg, Appellant.

In re: Lawrence G. WILLIAMS, Debtor.

Lawrence G. WILLIAMS,
Plaintiff, Appellee,
v.
UNITED STATES of America
Defendant, Appellee.

Charles J. Cannon, Appellant.

Nos. 97-2437, 97-2438

United States Court of Appeals
First Circuit

Heard June 5, 1998

Decided Sept. 11, 1998

Before SELYA, Circuit Judge, ROSENN* and CAMPBELL, Senior Circuit Judges.

SELYA, Circuit Judge.

This case presents a question of first impression in this circuit: Are a trial court's published findings of attorney misconduct, originally rendered in support of monetary sanctions, independently appealable, notwithstanding that the monetary sanctions imposed by the court for that conduct have been nullified? Our sister circuits are divided on this important question. *Compare Bolte v. Home Ins. Co.*, 744 F.2d 572, 572-73 (7th Cir. 1984), *with Walker v. City of Mesquite, Tex.*, 129 F.3d 831, 832-33 (5th Cir. 1997). We conclude that the court's findings, simpliciter, are not appealable. Hence, we dismiss the instant appeals for want of appellate jurisdiction.

I. BACKGROUND

In 1990, Lawrence G. Williams filed a voluntary petition in bankruptcy. During the bankruptcy proceeding, the United States filed proofs of claim seeking roughly $6,500,000 in unpaid federal taxes (resulting primarily from the disallowance of deductions claimed by the debtor). Williams responded that an offer of settlement made by the Internal Revenue Service (IRS) and accepted by him in 1989 substantially reduced his tax liability from the amount stated in the proofs of claim. As Williams described it, the settlement proposal was coincident with the resolution of Tax Court proceedings involving the Arbitrage Management

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* Of the Third Circuit, sitting by designation.

Partnerships (the partnerships), a group of tax shelters in which he had invested.

To test the parties' competing positions, and to fix the amount and dischargeability of his outstanding federal income tax liability, Williams filed an adversary action against the United States within the bankruptcy proceeding. Following the initiation of this action, the parties undertook discovery. At about this time, Charles J. Cannon, an attorney in the Tax Division of the United States Department of Justice, entered his appearance on behalf of the United States. On April 30, 1991, Williams served a formal demand for production of documents. The United States had thirty days to respond to this demand, *see* Fed.R.Civ.P. 34(b), but failed to take timely action. On June 10, Williams moved to compel production. At that point, the government produced some documents and objected to the production of others. The bankruptcy court (Votolato, J.) convened a hearing on the motion to compel, overruled the government's objections, and ordered it to produce the remainder of the disputed documents within forty-five days.

The government produced some, but not all, of the specified documents within the allotted time. In April 1992, the debtor filed a motion for partial summary judgment claiming that, for several of the relevant tax years, the government had not produced documents relating to either (1) extensions of the statute of limitations, or (2) the partnerships' tax audits. The bankruptcy court denied the motion.

The debtor then moved, on much the same grounds, to preclude the government from introducing certain documents at trial. *See* Fed.R.Civ.P 37(b)(2)(B). In its response, the government argued that it had provided all documents in its

possession relating to the statute of limitations. The government admitted that it had not produced the partnerships' audit files, but maintained that the debtor had never formally requested them. Because the parties were trying to settle the adversary action, the bankruptcy court did not schedule a hearing on the preclusion motion until January 1995. At that session, the court heard considerable evidence (much of it conflicting), entertained oral argument, and reserved decision.

In an opinion dated April 14, 1995, the bankruptcy court denied the preclusion motion, but imposed Rule 37(b) sanctions on the government, Cannon, and William L. Blagg (an IRS attorney who had assisted Cannon in endeavoring to respond to Williams's discovery requests) for failing timely to produce the partnerships' audit files and certain other documents. *See In re Williams,* 181 B.R. 1, 5 (Bankr.D.R.I.1995) (*Williams I*). In the course of this opinion, Judge Votolato harshly criticized Blagg and Cannon, characterizing their conduct as obstructionist and unjustified. Among other things, he referred to Blagg's testimony as "pure baloney," *id.* at 4, and ranked Cannon's "performance and credibility at about the same level as [Blagg's]," *id.* at 5. As a sanction, the judge ordered Blagg and Cannon each to pay $750 (and not to seek indemnity from their employer), and ordered the government to reimburse Williams for attorneys' fees incurred in obtaining the documents. *See id.*

Blagg, Cannon, and the government moved for reconsideration. Judge Votolato issued another opinion on October 24, 1995, in which he vacated the monetary sanction against Blagg, but refused to vacate either the sanction imposed on Cannon or his findings with respect to the lawyers' conduct. *See In re Williams*, 188 B.R. 721, 725-28

(Bankr.D R.I.1995) (*Williams II*). He did, however, order that Cannon pay the sanction amount ($750) to the debtor as a reimbursed expense, rather than to the registry of the court. *See id.* at 731.

Blagg, Cannon, and the government appealed to the United States District Court for the District of Rhode Island. The district court (Lisi, J.) agreed that Blagg and Cannon had conducted themselves improperly, but found for technical reasons that sanctions could not be imposed under Rule 37(b)(2).[1] *In re Williams*, 215 B.R. 289, 301-02 (D.R.I.1997) (*Williams III*). The district court therefore annulled the monetary sanction against Cannon. *See id.* at 302. The district court nonetheless refused to vacate the bankruptcy court's factual findings, i.e., criticisms of the attorneys made in the course of its opinion. *See id.* at 303. These appeals ensued. In them, Blagg and Cannon seek vacation of the bankruptcy court's findings—nothing more.

II. ANALYSIS

The threshold question in this matter is whether the bankruptcy judge's published findings of fact, attributing misconduct to Blagg and Cannon, are appealable. The answer depends on whether the findings, simpliciter, comprise a decision, order, judgment, or decree. *See* 28 U.S.C. § 158(d)(1994) (conferring appellate jurisdiction over "all

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[1] Sanctions under Rule 37(b)(2) may not be levied without the issuance, and subsequent violation, of a formal order under Rule 37(a). *See R.W. Int'l Corp. v. Welch Foods, Inc.*, 937 F.2d 11, 19 (1st Cir.1991). The compulsion to produce the partnerships' audit files, the failure to comply with which occasioned the monetary sanctions, was never memorialized in such an order. This omission precluded affirmance of the remaining sanction.

final decisions, judgments, order, and decrees" rendered by a district court on appeal from a bankruptcy court); *id.* § 1291 (1994) (granting jurisdiction over "appeals from all final decisions of the district courts"). We conclude that they do not, and therefore dismiss the attorneys' appeals.

At the outset, it bears reemphasis that, while the bankruptcy court's opinions, including its criticism of the attorneys, remain intact, there are no longer any monetary sanctions extant in this case. The bankruptcy court itself vacated the monetary sanction imposed on Blagg, *see Williams II*, 188 B.R. at 728, and the district court annulled the monetary sanction levied against Cannon, *see Williams III*, 215 B.R. at 302. The instant appeals thus hinge on the legal significance of the bankruptcy court's published findings of fact.[2] In the district court, Blagg and Cannon argued, *inter alia*, that these findings in themselves operated as a sanction (particularly since the bankruptcy judge memorialized them in published opinions). The appellants therefore requested that the findings be stricken, both because they received insufficient process and because their conduct was not sanctionable. Judge Lisi assumed *arguendo* that the findings operated as a sanction, but found neither a procedural nor a substantive defect. *See Williams III*, 215 B.R. at 303. She harbored "no qualms" about the bankruptcy court's findings, having satisfied herself that they were supported by the

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[2] To be sure, the appellants also excoriate the district court's endorsement of, and elaboration on, the bankruptcy court's unflattering comments. *See Williams III*, 215 B.R. at 302-03. This, umbrage adds nothing to the jurisdictional equation, as the district court's findings—like those of the bankruptcy court are not accompanied by a sanction. Consequently, after a brief review of the district court's findings, we will focus on the bankruptcy court's findings. *See Williams II*, 188 B.R. at 725-27; *Williams I*, 181 B.R. at 2-5.

record. *Id.* Before us, the appellants purport to appeal these linguistic "sanctions" on much the same bases that they advanced below and ask that we vacate the relevant findings of both lower courts.

Imposing sanctions against counsel is a serious matter. Hence, when a federal court deems such a course appropriate, it must make specific findings in support of its order. *See, e.g., Navarro-Ayala v. Nunez,* 968 F.2d 1421, 1427 n. 5 (1st Cir.1992); *Foster v. Mydas Assocs.,* 943 F.2d 139; 142-43 (1st Cir.1991). Such findings serve a variety of salutary proposes; among other things, they enable a reviewing court to determine whether the sanctions imposed have sufficient grounding in law and in fact. *See Foster,* 943 F.2d at 141-42. In this case, the bankruptcy court's findings were both explicit and unflattering, and the appellants understandably take issue with the court's depiction of their conduct.

Still, it is an abecedarian rule that federal appellate courts review decisions, judgments, orders, and decrees—not opinions, factual findings, reasoning, or explanations. *See Navieros Inter-Americanos, S.A. v. M/V Vasilia Express,* 120 F.3d 304, 316 (1st Cir.1997); *Sun-Tek Indus. v. Kennedy Sky Lites, Inc.* 856 F.2d 173, 176 (Fed.Cir.1988); *Bolte,* 744 F.2d at 573; *W.W. Windle Co. v. Commissioner,* 550 F.2d 43, 45-46 (1st Cir.1977). Blagg and Cannon attempt to evade this rule by artful characterization. The imposition of a sanction on an attorney is universally regarded as an order, and, if an appellate tribunal has jurisdiction to review such an order,[3] its examination will encompass the underlying

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[3] A mid-case sanctions order may or may not be immediately appealable by an affected attorney. *Compare Chaves v. M/V Medina Star,* 47 F.3d 153, 155-56 (5th Cir.1995) (allowing interlocutory appeal of sanctions imposed

findings. *See, e.g., Whitney Bros. Co. v. Sprafkin*, 60 F.3d 8, 11-12 (1st Cir.1995). Invoking this truism, Blagg and Cannon posit that the bankruptcy court's harshly worded findings are tantamount to a sanction in the form of a public reprimand and therefore, ground appellate jurisdiction. We do not agree.

Although the appellants regard the findings as injurious to their professional reputations, their earlier success has compromised their ability to press the point. The bankruptcy court chose to impose monetary sanctions, not a reprimand, in response to the perceived misconduct.[4] *See Williams I*, 181 B.R. at 5. These sanctions have now been ameliorated. *See Williams II*, 188 B.R. at 728 (withdrawing monetary sanction previously levied against Blagg); *Williams III*, 215 B.R. at 302 (vacating monetary sanction levied against Cannon). Because no sanction remains, we lack jurisdiction to consider the propriety of the offending findings. *See Sun-Tek Indus.*, 856 F.2d at 176 (explaining that, although appellate courts may scrutinize findings in tandem with the review of judgments, they "do not review findings independently");

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on attorney), *and Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 539 (3d Cir.1985) (similar), *with Starcher v. Correctional Med. Sys., Inc.*, 144 F.3d 418, 423-24 (6th Cir.1998) (barring interlocutory appeal of sanctions imposed on attorney), *and Appeal of Licht & Semonoff*, 796 F.2d 564, 572-73 (1st Cir.1986) (similar). Because we find no sanctions order here, *see* text *infra*, we need not go down this road.

[4] Our dissenting brother suggests that bankruptcy court "implied" that it intended its published findings, simpliciter, to operate as a sanction. *See post* at 96. This implication is totally unwarranted. Moreover, the fact that our brother feels free to draw the implication illustrates the limitless nature of the rule that he espouses; it always will be possible to argue that, despite the lack of any express reference to a reprimand, the judge must have intended one—or else he would not have been so critical.

W.W. Windle Co., 550 F.2d at 45 (emphasizing that appellate jurisdiction over Tax Court decisions does not permit review of "findings and rulings . . . apart from their effect upon the decision").

The appellants derive no succor from their victories. They insist that the bankruptcy court's findings besmirch their professional reputations to such an extent that they operate as a *de facto* sanction. The lower courts could have vacated the challenged findings coincident to granting relief from the monetary sanctions themselves, but neither tribunal exhibited an inclination to do so.[5] For our part, we are not unsympathetic to the appellants' plaint. It is trite, but true, that a lawyer's professional reputation is his stock in trade, and blemishes may prove harmful in a myriad of ways. Yet not every criticism by a judge that offends a lawyer's sensibilities is a sanction. Read in context, the bankruptcy court's descriptions of the attorneys' behavior in this case plainly were not the sanction itself, but, rather, served to justify the imposition of monetary sanctions. *See Williams I*, 181 B.R. at 5. Nowhere in his rescript does Judge Votolato issue an express reprimand or otherwise intimate that a tongue-lashing comprises any part of the designated penalty.

Blagg and Cannon offer a contrary characterization of Judge Votolato's opinion. They and the amici seize upon the unarguable fact that reprimands are included in the armamentarium of sanctions from which a judge may select if he or she purposes to punish attorney misconduct. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 263,

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[5] To the contrary, both Judge Lisi and Judge Votolato reiterated their belief that the appellants' conduct during the litigation deserved condemnation. *See Williams III*, 215 B.R. at 303; *Williams II*, 188 B.R. at 725-27

108 S.Ct. 2369, 101 L.Ed.2d 228 (1988); *United States v. Horn*, 29 F.3d 754, 766-67 (1st Cir.1994); *see also* Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* 259, 496, 539 (2d. ed.1994). Building on this foundation, they argue that, even if a judge does not designate his comments as a formal reprimand, harsh words that reflect adversely on a lawyer's professionalism always should be treated as a reprimand (and, therefore, as a sanction). This argument invites us to draw a line between routine judicial commentary on a lawyer's performance (presumably non-appealable) and commentary that is inordinately injurious to the lawyer's reputation (presumably appealable). We decline this invitation on multiple grounds.

Practically speaking, any rule that purports to transform harsh judicial words into a "*de facto* sanction" will be almost impossible to cabin. After all, attempting to distinguish "ordinary" findings from "extraordinary" ones by differentiating between degrees of abrasiveness can only proceed on an ad hoc basis. We are unable to formulate a test—and the appellants have offered none—that would provide any meaningful guidance to the lower courts and the bar as to when commentary crosses the line and becomes a sanction.

This same vice characterizes the approach taken by our dissenting colleague. Judge Rosenn seemingly focuses on discerned intent. *See, e.g., post* at 96 (suggesting that findings, simpliciter, are an appealable sanction as long as they are "specifically intended as punishment for misconduct"); *id.* at 98 (suggesting that findings, simpliciter, are not an appealable sanction as long as "they are not intended to punish or deter"). But a rule that routinely puts a judge's subjective intent in issue is fraught with peril. Lawyers—especially lawyers who have been roundly

criticized—almost always will suspect the worst. We fear that permitting anything less than a formal reprimand to form the predicate for an appeal will be an invitation to litigation (and considerable wheel spinning) over what may be challenged and what not.

Equally as important, if injury to reputation is the guiding precept, as the appellants and the amici suggest, there is no principled basis for distinguishing between a chastised attorney and any other participant in the judicial process who becomes the target of the presiding judge's opprobrium. As Judge Posner astutely notes, under such a regime, "[l]awyers, witnesses, victorious parties, victims, bystanders—all who might be subject to critical comments by a district judge—could appeal their slight if they could show it might lead to a tangible consequence such as a loss of income." *Bolte,* 744 F.2d at 573. Thus, accepting a *de facto* sanction theory like that advanced by the appellants and the amici would presage "a breathtaking expansion in appellate jurisdiction." *Id.*

Another practical problem arises from the reality that appeals from findings often will be unopposed. After all, the parties to a case usually are interested in the decision, order, judgment, or decree, and not in the findings (except to the extent that they relate to the decision, order, judgment, or decree). So it is here: the debtor, understandably, has not seen fit to spend time and money on an issue that has no bottom-line implications for him. This means, of course, that a reviewing court will hear only one side of the story, and will be deprived of the balanced adversarial presentation that is so helpful to the proper functioning of the appellate process.

The policy implications of the appellants' argument also militate against its adoption. The net result would be tantamount to declaring open season on trial judges. If chastened attorneys can enlist appellate courts to act as some sort of civility police charged with enforcing an inherently undefinable standard of what constitutes appropriate judicial comment on attorney performance, trial judges are more likely to refrain from speaking and writing candidly. In our view, this chilling effect carriers with it risks that are far greater than those associated with the evil of occasional overheated judicial commentary. Judicial candor is a trait strongly valued, both generally and in the sanctions context, and discouraging it will serve only to erode public confidence in the courts. *See* Bruce M. Selya, *The Confidence Game: Public Perceptions of the Judiciary,* 30 New Eng. L.Rev. 909, 915 (1996). Indeed, the well-entrenched doctrine of absolute judicial immunity from liability for defamation is rooted in concerns about preserving judicial independence, effectiveness, and frankness. *See, e.g., Pierson v. Ray,* 386 U.S. 547, 553-54, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1871). Those same concerns are very much in play here. *Cf. Blondin v. Winner,* 822 F.2d 969, 974-75 (10th Cir. 1987) (rejecting an aggrieved attorney's petition for mandamus seeking to strike allegedly defamatory comments issued by a district judge and suggesting potential First Amendment implications of granting the petition).

These considerations of practice and policy conduce to the conclusion that a jurist's derogatory comments about a lawyer's conduct, without more, do not constitute a sanction. A trial judge has the obligation to assure the proper conduct of proceedings in his or her court, *see Quercia v. United States,* 289 U.S. 466, 469, 53 S.Ct. 698, 77 L.Ed. 1321

(1933); *United States v. Polito*, 856 F.2d 414, 418 (1st Cir. 1988), and must retain the power to comment, sternly when necessary, on a lawyer's performance without wondering whether those comments will provoke an appeal.

Bearing the burden of a judge's unflattering remarks traditionally has been among the rigors associated with trial practice. While unfairness can and does occur, we fear that the appellants' proposed cure would be more debilitating than the disease, in that it would, over time, reduce the judge to a kind of trial examiner perceived as such by those practicing before him. We recognize that the best judges, like the best teachers, often exert control with perfect courtesy; but, even so, the sense of power held in reserve can be essential. Once we remove a judge's power, it can never be restored. We cannot expect judges to preside effectively over discovery and trials, and yet routinely subject them to appeals from critical comments reflecting their displeasure with the conduct of those they are charged with controlling.

Let us be perfectly clear. Sanctions are not limited to monetary imposts. Words alone may suffice if they are expressly identified as a reprimand. *See, e.g., Dawson v. United States*, 68 F.3d 886, 894 (5th Cir.1995) (reviewing an order expressly imposing a reprimand and requiring the attorney to attend an ethics course). *But see Clark Equipment Co. v. Lift Parts Mfg. Co.*, 972 F.2d 817, 820 (7th Cir. 1992) ("[W]e have already decided that any attorney may not appeal from an order that finds misconduct but does not result in monetary liability, despite the potential reputational effects."). But critical comments made in the course of a trial court's wonted functions—say, factfinding or opinion

writing—do not constitute a sanction and provide no independent basis for an appeal.[6]

Our holding does not leave a chastised attorney remediless. A lawyer is free to petition for a writ of mandamus, *see* 28 U.S.C. § 1651 (1994), and request that offending commentary be expunged from the public record. *See, e.g., Bolte*, 77 F.2d at 573; *cf. Fromson v. Citiplate, Inc.*, 886 F.2d 1300, 1304 (Fed. Cir. 1989) (observing that mandamus is a more appropriate means of deleting derogatory comments from a district court opinion, but interpreting Second Circuit law as implicitly permitting an appeal); *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1188 n. 11, 1190-94 (8th Cir. 1984) (employing mandamus to strike a trial judge's withering, and unjustified, condemnation of identified corporate officers from the public record).

Our dissenting colleague attempts to minimize the utility of this remedy by noting that a court should not resort to mandamus "when it can exercise the same review by a contemporaneous ordinary appeal." *Post* at 99 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 8 n. 6, 103 S.Ct. 927, 74 L.Ed2d 765 (1983)). That, however, is precisely the point. In this type of

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[6] We are conscious that this holding may be viewed by some as formalistic. Heavy-handed criticism of an attorney by a judge may exact a considerable price, even when the judge does not formally frame the criticism as a reprimand. This reality apparently drives our dissenting brother's willingness to entertain appeals from findings alone, *see post* 95-99 (Rosenn, J., dissenting), as well as the Fifth Circuit's, *see Walker*, 129 F.3d at 832. Despite Judge Rosenn's reasoned responses to our concerns and his arguments in favor of appellate jurisdiction in these circumstances, we remain unpersuaded. As for *Walker*, it fails to address our concerns specifically and we respectfully decline to follow it.

situation, in which the ostensibly aggrieved lawyer seeks to challenge findings rather than the trial court's decision, judgment, order, or decree, no contemporaneous appeal lies. Mandamus, therefore, is available to correct unwarranted judicial excesses of this nature. We caution, however, that mandamus must be employed sparingly. In line with the writ's accustomed uses, it should be reserved for "those rare cases in which the issuance (or nonissuance) of an order presents a question anent the limits of judicial power, poses some special risk of irreparable harm to the appellant, and is palpably erroneous." *Horn*, 29 F.3d at 769; *accord Blondin*, 822 F.2d at 973-74 (noting that mandamus relief is available to an attorney who wishes to expunge portions of a published opinion only where the "right to relief is clear and indisputable").

We doubt that mandamus is proper here, but the question need not detain us. The appellants requested mandamus relief in the district court but never renewed that entreaty in this venue. Therefore, we deem the point waived.[7]

III. CONCLUSION

We need go no further. While the bankruptcy court's criticism of the appellate in its two published opinions strikes us as unnecessarily strident, findings alone are not appealable.

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[7] Of course, a federal court of appeals in its discretion may treat an attempted appeal from an unappealable order as a petition for writ of mandamus to prevent injustice. *See Horn*, 29 F.3d at 769. Given the appellants' apparently conscious decision to abandon their quest for mandamus relief and the lack of any evidence that the bankruptcy judge so clearly abused his discretion as to constitute "a judicial usurpation of power," *Allied Chem. Corp. v. Daiflon, Inc.* 449 U.S. 33, 35, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980) (per curiam), we are not inclined to take such a step.

Thus, we dismiss the appeals for want of appellant jurisdiction. We add only a brief coda: if anything about this case is clear, it is that emotions have run particularly high throughout the course of litigation. Maintaining control over such charged proceedings is tough sledding, and trial judges must be granted "some margin of humanity" in performing that arduous task. *Polito*, 856 F.2d at 418.

Appeals dismissed.

ROSENN, Circuit Judge, dissenting.

Because the substance of the published reprimand and the circumstances attending its declaration by the court give it all of the characteristics of an order imposing a sanction, I would allow the appeal. I therefore respectfully dissent.

I.

In order to understand that the published chastisement and censure of government counsel was substantially more than an ordinary finding of fact, some additional background may be helpful. Lawrence G. Williams filed a complaint in 1991 in an adversary action against the United States in a bankruptcy proceeding he had initiated the preceding year. The purpose of the complaint, among other things, was to determine the amount and dischargeability of his outstanding federal income tax liability. Beginning in the late 1970s, Williams invested in a group of tax shelters known as the Arbitrage Management Partnerships ("the partnerships"). Williams made numerous deductions on his federal income tax returns related to his investments in these partnerships. The partnerships ultimately failed. During the bankruptcy proceedings, the United States filed proofs of claim ultimately seeking $6.5 million in unpaid

federal taxes which resulted from the disallowance of many of the deductions claimed by Williams.

Subsequent to the partnerships' failure, the Internal Revenue Service (IRS) sought to audit the partnerships and the partnerships' individual investors. Because of the thousands of individuals and entities involved in the partnerships, a lawsuit was filed and the United States Tax Court supervised an attempt to resolve all of the tax deficiencies on a consolidated basis. The court subsequently was advised that a tentative settlement had been reached. In February 1989, the IRS wrote Williams advising him of the terms of the proposed settlement and of the procedures he had to follow if he wished to accept it. In the instant adversary action in the bankruptcy court, Williams claimed that he had accepted the IRS's offer of settlement. He argued that, because of his acceptance of the offer, his tax liability was substantially reduced from the amount claimed by the United States in its proofs of claim.

Following the filing of the adversary action, the Government and Williams engaged in discovery. Pursuant to Federal Rule of Civil Procedure 34(a), Williams served a formal request for production of numerous documents on the United States for the period commencing 1978 to the date of his request. On April 10, 1992, Williams filed a motion for partial summary judgment asserting that the United States had not only failed to produce all of the documents relating to the extension of the statute of limitations, but also failed to produce files and documents relating to the IRS audits of the partnerships ("the partnership audit files"). The bankruptcy court denied the motion.

Based on the same grounds, pursuant to Federal Rule of Civil Procedure 37(b)(2),[8] Williams moved to preclude the Government from introducing certain documents at trial. In its response, the United States argued that it had provided all of the documents in its possession relating to the statute of limitations and did not produce the partnership audit files because Williams had never formally requested them. Subsequently, the parties informed the bankruptcy court that they would attempt to reach a settlement in the adversary action. Accordingly, the court did not schedule a hearing on Williams's preclusion motion until January 1995, after the talks apparently broke down.

II.

Significantly, for the purpose of the matter presently before us on this appeal, the proposed prehearing orders submitted to the Bankruptcy Court by both Williams and the Government identified the ultimate issue as

> [w]hether the appropriate sanction [to] be imposed against the Government under the circumstances, should be the striking of the Government's pleadings and the entry of judgment [by default] in favor of the plaintiff and against the Government, or some other sanction pursuant to Rule 37(b) of the Federal Rules of Civil Procedure.

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[8] Rule 37(b)(2) provides in part: "If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just," including establishing facts against the disobedient party, precluding the disobedient party from introducing certain evidence, striking pleadings, finding the disobedient party in contempt, or ordering the disobedient party to pay the other party's attorney's fees. Federal Rule of Bankruptcy Procedure 7037 makes this rule applicable in adversary actions.

Williams did not request any sanctions against either Cannon or Blagg personally.[9] Thus, a major purpose of the hearing was the imposition of sanctions. Indeed, the Bankruptcy Court, in its published opinion following the hearing, identified its decision in part, as "GRANTING PARTIAL RELIEF ON DEBTOR'S REQUEST FOR SANCTIONS AGAINST THE INTERNAL REVENUE SERVICE." (Upper case in original). The court denied Williams' motion for preclusion but sanctioned the Government, Cannon, and Blagg pursuant to Rule 37(b) for failure to produce the partnership audit files and the settlement payments. The court made numerous anecdotal findings of fact in support of the sanctions and also made the following specific findings:

> 1) We find that throughout the long pendency of this adversary proceeding the Defendant [the Government] has repeatedly and deliberately violated Rule 37(b).
> 2) We also find and conclude that the IRS's failure to comply with outstanding discovery orders was not substantially justified; that there are no other circumstances that would make an award of expenses unjust, and that sanctions are definitely in order. The only real issue is the amount and/or *kind of sanctions* that are appropriate, on the facts before us. (emphasis added)
> 3) In addition, we find that its actions were specifically calculated to impede Plaintiff's attempts to obtain discovery material to which it was clearly entitled.

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[9] Blagg, although employed by the IRS, had not entered an appearance in its behalf or on behalf of any department of the Government. He was merely aiding Cannon in finding the documents that were presumably in the possession of the Internal Revenue Service. Cannon represented the Government in these proceedings, including the IRS.

See In re Williams, 181 B.R. 1 (Bankr.D.R.I.), *vacated in part on reconsideration,* 188 B.R. 721 (Bankr.D.R.I.1995), *aff'd in part and vacated in part,* 215 B.R. 289 (D.R.I.1997). As to Blagg, the court made the following statement: "We find Mr. Blagg's conduct to be intentional, unprofessional, and unjustified" and it referred to certain of his testimony as "pure baloney." 181 B.R. at 3. It also declared Cannon's "performance and credibility at about the same level as [Blagg]." The court also ordered Cannon and Blagg each to pay $750 fines to the court.

Following a motion of the Government for reconsideration or amendment of the opinion of April 14, 1995, the bankruptcy court, in an opinion dated October 24, 1995, agreed that several corrections and amendments to its original opinion were in order, including vacating the monetary sanction against Blagg, recognizing that he "did not file a formal entry of appearance." The court, however, refused to vacate published statements as to Blagg and Cannon. *See In re Williams,* 188 B.R. 721.

Blagg, Cannon, and the Government appealed to the United States District Court for the District of Rhode Island. At the time of the appeal, the bankruptcy court's order was not final within the meaning of 28 U.S.C. § 158(a)(1) because of the pending underlying adversary action. The district court, however, allowed the appeal pursuant to 28 U.S.C. § 158(a)(3), which permits the appeal of interlocutory orders with court permission. *See In re Williams*, 215 B.R. at 297. The district court agreed that Cannon and Blagg had conducted themselves improperly, but found that they had not violated Rule 37(b) or any other rule because Williams had never formally requested either the partnership audit files or the settlement documents. *See* 215 B.R. at 301-02. The district court therefore, vacated the monetary sanction against Cannon, but refused to vacate the

bankruptcy court's published reprimand of counsel. Citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-66, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), the court ruled that the public reprimand was not erroneous under the federal courts' "inherent power" to sanction misbehaving attorneys. *See* 215 B.R. at 303.

III.

The majority dismiss the appeal before us for want of jurisdiction on grounds that the published chastisement of counsel was not contained in an order, judgment, or decree of the court, but amounted only to findings of fact in support of the monetary fines imposed. However, the monetary sanctions against Blagg subsequently were vacated by the bankruptcy court and the findings of fact in support of them served no purpose except to humiliate and punish him. Thus, the chastisement had a vitality and purpose of its own, separate and independent of the monetary sanctions. Similarly, as to Cannon, when the United States District Court ruled that Cannon and Blagg "did not, in fact, violate an order of the district court," 215 B.R. at 303, it vacated the fine as to Cannon but not the reprimand as to him or as to Blagg. The district court then gave the reprimands an independent status and importance much more significant than an ordinary finding of fact in support of the fines. It regarded the offensive statements as sanctions. *Id.*

Although the essence of the bankruptcy court's reprimand to counsel is couched as a finding, it is much more than a basic finding of fact in support of sanctions. The factual findings supporting the sanctions are stated elsewhere in the opinion and specifically refer to counsel's alleged shortcomings and dereliction with respect to the production of documents and

Blagg's failure to respond to telephone calls.[10] Although the court did not label the reprimand as an order or decree in its opinion, "Granting Partial Relief on Defendant's Request for Sanction" it stated that Blagg's conduct "is intentional, unprofessional, and unjustified." This is not a mere finding of fact but an ultimate statement of censure, intended to punish counsel, a punishment emphasized by its publication. A linguistic reprimand is "[t]o reprove severely." *See Black's Law Dictionary* 1302 (6th ed.1990). Therefore, appending an "order" or "decree" to it may provide a label but adds no operative substance; no action is required from the censuree to make it effective.

Although it is not dispositive to our decision, we note that both the bankruptcy and district courts assumed that the reprimand of Blagg and Cannon constituted sanctions. The bankruptcy court implied by its quotation of *United States v. Horn*, 29 F.3d 754, 766-67 (1st Cir.1994), that a "public[ ] reprimand" is a proper method of punishing misbehaving lawyers. *See* 188 B.R. at 730. Similarly, the district court held that it could uphold the "[p]ublic [r]eprimand" of Cannon and Blagg under the federal courts' inherent power to manage its affairs and discipline the attorneys appearing before it, even though it vacated the fine imposed against Cannon. *See* 215 B.R. at 302.

In *United States v. Santtini*, 963 F.2d 585, 590 (3d Cir.1992), the court of appeals concluded that "a district court's orders lacking the precise label 'injunction' may be appealable under § 1292(a)(1) if their effect is injunctive." It seems to me that a deliberate declaration by a court reprimanding harshly

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[10] The factual findings are found in footnotes 6-8 and in various portions of the text of the opinion. *See* 181 B.R. at 3-4.

and stridently a lawyer, in a published opinion dealing with sanctions, and conjunctive with an order imposing monetary fines constitutes a sanction, even though the monetary sanctions were subsequently vacated because of error. Indeed, the United States Supreme Court has endorsed the use of a public reprimand in a published opinion as a method of chastising a lawyer in *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988); *accord United States v. Hasting*, 461 U.S. 499, 506 n. 5, 103 S.Ct. 1974, 76 L.Ed.2d 96 ("The Court also could have publicly chastised the prosecutor by identifying him in its opinion.").

I am mindful that every pejorative expression or criticism by a court of a lawyer is not subject to appeal. Nor should it be if courts are effectively to function in forums of dispute. For example, a criticism of a lawyer's performance during trial, when intended to end that lawyer's duplicative questioning of a witness or introduction of irrelevant evidence, and not intended as a sanction, may not be appealed. Criticism and directions to courts and parties are essential tools of a trial judge to control the litigation in the court. In contrast, a public reprimand of an attorney in a published opinion which is specifically intended as punishment for misconduct stands in a different category; it should be appealable, even though the label of an order is absent. A censure of this sort can be harsh punishment because presumably it will adversely affect a lawyer's reputation and strongly deter future misconduct because of its sharp and public rebuke. Further, this court and others agree.[11]

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[11] *See Horn*, 29 F.3d at 758 n. 1 & 766-67 (citations omitted); *see also United States v. Myers*, 123 F.3d 350, 356 n. 3 (6th Cir.), *cert. denied*, — U.S. —, 118 S.Ct. 611, 139 L.Ed.2d 498 (1977); *McQueen v. Bullock*, 907 F.2d 1544, 1551 n. 20 (5th Cir.1990); *United States v. Isgro*, 974 F.2d 1091, 1099 (9th Cir.1992); *United States v. Prince*, 1994 WL 99231 (E.D.N.Y.).

According to the majority, vacating the monetary fines, as the bankruptcy court and the district court together did here, deprives this court of jurisdiction. The majority hold that because, "we lack jurisdiction to consider the propriety of the offending findings." Maj. op. at —. The absence of monetary sanctions should in no way adversely affect the appealability of the reprimand. Monetary sanctions only affect one's bank account; linguistic sanctions can be far more penetrating and damaging. They can pierce the heart and the reputation of the lawyer at whom they are aimed, and, in the long run, probably will strike the lawyer's bank account as well.

In *Walker v. City of Mesquite*, 129 F.3d 831 (5th Cir.1997), the United States Court of Appeals for the Fifth Circuit concluded that an attorney may appeal a public reprimand even when no monetary sanctions have been imposed. The court reasoned that an attorney's professional reputation is "a lawyer's most important and valuable asset." Allowing an appeal when an attorney has been fined a nominal amount but denying an appeal from "a finding and declaration by a court that counsel is an unprofessional lawyer" is anomalous. A lawyer may suffer much more because of injury to his reputation caused by a public rebuke than by a fine. *Id.* at 832. Also, without discussion, the Fifth Circuit permitted an appeal of a reprimand of attorneys which included a finding primarily that they acted in bad faith, but did not impose a monetary sanction. *See Dawson v. United States*, 68 F.3d 886, 894-95 (5th Cir.1995).

Similarly, the District of Columbia Circuit allowed an appeal by an attorney from a finding by the Court's disciplinary committee that the attorney engaged in misconduct even though the committee did not impose a monetary penalty. *See Sullivan v. Committee on Admissions & Grievances*, 395 F.2d 954, 956 (D.C.Cir.1967). The Court rejected the contention that a

penalty other than an reprimand was required in order to permit an appeal, likening the disciplined attorney to a criminal defendant that is convicted but whose sentence is suspended. *Id.* at 956; *see also Fromson v. Citiplate, Inc.*, 886 F.2d 1300, 1304 (Fed.Cir.1989).[12]

The majority is fearful that permitting anything less than a "formal reprimand" to form the predicate for an appeal will invite litigation. Maj. op. at 91. It seems to me that the determining factor should not be the formality of the reprimand but its essential substance. In our analysis of our appellate jurisdiction, "we are not constrained by the district court's characterization of its order." *See Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 96 (3d Cir.1988). Labeling a public reprimand as an order adds nothing significant; the substance is in the content. An attorney who is publicly reprimanded, (*i.e.*, for the purpose of punishing him and deterring others from similar behavior) for misconduct should be entitled to review. Such a reprimand rises above the permissible perimeters of mere criticism. Allowing an appeal in such a situation does not invite litigation of every adverse factual finding or criticism of attorney behavior in the conduct of litigation as the majority suggests. Rather, it merely equates public reprimands with the same jurisdictional rules that are applied to appeals of monetary sanctions.

I also believe that the majority is unduly concerned that appeals from findings will be unopposed. Maj. op. at 91. In

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[12] In *Bolte v. Home Ins. Co.*, 744 F.2d 572 (7th Cir.1984), the court, however, reached a contrary result. It dismissed the appeal because it found that the order characterizing the defense attorneys' conduct was not a final and appealable order. *Accord Clark Equipment Co. v. Lift Parts Mfg. Co., Inc.*, 972 F.2d 817, 820 (7th Cir.1992) (citation omitted). *Cf. Sun-Tek Indus.*, 856 F.2d at 173, 176.

this case, as I have already noted, we are not concerned with basic findings of fact but with "a declaration of the court announcing the legal consequences of the facts found." *Black's Law Dictionary* 410 (6th ed.1990) (defining "Decree"). This declaration is, in effect, a "decree" which answers "for most purposes to the judgment of a court of law." *Id.* An appeal in such situations is no more unopposed than is an appeal from monetary sanctions. Had the monetary sanctions not been vacated in these proceedings and the appeal allowed, there is nothing that requires or even suggests that the appeal would have been opposed.

The majority also reasons that "policy implications" militate against allowing the appeal. It fears that permitting the appeal would charge an appellate court with enforcing an inherently undefinable standard of what constitutes an appropriate judicial comment on an attorney's performance and chill trial judges from speaking and writing candidly. Maj. op. at 91. Considerations of practice and policy lead the majority to conclude that "a jurist's derogatory comments about a lawyer's conduct, without more, do not constitute a sanction." Maj. op. at 92. I believe the majority's fears are groundless.

What is before us are not mere "derogatory comments." There is much more. Here, we have a chastisement enhanced by publication. The chastisement was conjoined with monetary fines which were vacated because of legal error. Moreover, the chastisement was not merely derogatory; it was imposed after a three day hearing held primarily for the imposition of sanctions for alleged misbehavior, and which were intended to be punitive. This censure did not amount to mere comments or criticism made during the heat of trial. The court's declaration was not an ordinary, derogatory comment but a deliberate, written, published reprimand after hearing, intended to punish

and deter, followed with monetary fines. In my opinion, this was an unequivocal sanction.

As for the majority's concern that a trial judge should retain the power to comment, sternly when necessary, on a lawyer's performance, I could not agree more. However, allowing an appeal from a public reprimand intended to punish and, in this case, simultaneously accompanied by monetary fines, in no way impinges on a trial judge's right to criticize or comment on an attorney's performance. A trial judge still retains broad, unappealable authority and the whole vocabulary to make pejorative comments or criticisms of a lawyer's performance without engaging in deliberate or published chastisement.

For example, hard-nosed and even caustic criticism of a lawyer's behavior, when intended to put a stop to that lawyer's misconduct, or even when the criticism is intended to control less offensive attorney behavior such as duplicative questioning of a witness or introduction of irrelevant evidence, and not intended as a sanction, are all ordinary efforts at courtroom administration and may not be appealed. *See United States v. Donato*, 99 F.3d 426,434 (D.C.Cir.1996); *cf. Hook v. McDade*, 89 F.3d 350, 355-56 (7th Cir. 1996) (judge's "strong" criticism of criminal defendant's refusal motion did not show bias), *cert. denied sub nom.*, — U.S. —, 117 S.Ct. 718, 136 L.Ed.2d 637 (1997); *Blanche Road Corp. v. Bensalem Twp.*, 57 F.3d 253, 266-67 (3d Cir.1995) (district court's calling counsel's direct examination "worst" it had ever seen not basis for judge's refusal). Also, a direct court's finding that a witness's testimony was untruthful or that an expert witness's opinion cannot be credited may not, on their own, be appealed. *Cf. Sun-Tek Indus.*, 856 F.2d at 176; *Bolte*, 744 F.2d at 573.

Allowing attorneys to appeal a public reprimand does not limit or chill the trial courts' broad power to administer justice and control their courtroom. Indeed, criticism and directions to parties are essential tools of a trial judge to control the litigation in the court. None of the hypothetical examples cited above constitutes a sanction or disciplinary action because they are not intended to punish or deter. *See National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.E.2d 747 (1976). Because we cannot foresee every possible circumstance under which tough criticism is appropriate and justified, these are only a few examples of proper and unappealable criticism, and not an exhaustive list. We note that criticism that is not contained in a published opinion will almost never be appealable.

In determining whether a judge's comments constitutes a sanction, we find helpful the cases dealing with motions to recuse judges based on bias. In *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.E.2d 474 (1994), the Supreme Court held that expressions of impatience, hostility toward counsel, dissatisfaction, annoyance, and anger by judges is not a basis for refusal. *Id.* at 556, 114, S.Ct. 1147; *see also Offutt v. United States*, 348 U.S. 11, 17, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (a "modicum of quick temper . . . must be allowed even judges"). The Court reasoned that ordinary efforts at courtroom administration, even when expressing extreme anger and hostility, must be immune from challenges on this ground if the courts are to perform properly. *Id.; see also Blanche Road*, 57 F.3d at 266. The same reasoning applies in the context of this case. Hence, a judge's criticism or unfavorable characterization of a lawyer's conduct when intended as an "ordinary effort at courtroom administration" is not subject to appeal.

In contrast, a public reprimand of an attorney in a published opinion which is specifically intended to chastise and punish for misconduct stands in a different category. A censure of this sort can be harsh punishment because presumably it will adversely affect a lawyer's reputation and career and strongly deter future misconduct because of its sharp and public rebuke. In such an instance, there are strong policy consideration for allowing such an appeal.

Under the majority's view, it is possible for a judge to harshly censure or chastise the lawyer in a published opinion and intend to punish but avoid appellate review. The trial judge can escape appellate review of an unfounded or intemperate censure merely by refraining from labeling the public reprimand as an order or decree.

On the other hand, a policy consideration that strongly favors the appealability of the reprimand is that lawyers are quasi-officers of the court. Many of them appear in court on almost a daily basis. For approximately two centuries, the lawyers of this nation have been the Constitution's guardians. Notwithstanding the transformation of the legal profession in recent years, lawyers still remain the lifeblood of our legal system. Denying them the right to an appeal in a matter impugning their character, competence or integrity in a trial matter and which publicly and harshly censures them merely because the chastisement is not expressly a "formal reprimand" exalts form over substance. I fear that lawyers will not regard such a technicality as an improvement of the image and quality of justice of our legal system.

Apparently recognizing that lawyers may be without a remedy, the majority suggests that the chastised lawyer may petition for a writ of mandamus to expunge the offensive

censure from the record. Mandamus, however, is a slender reed on which to lean for appellate review. It is an extraordinary writ and a court of appeals should not utilize it "when it can exercise the same review by a contemporaneous ordinary appeal." *See Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 8 n. 6, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *see also* 16 Charles Alan Wright et al., *Federal Practice and Procedure*, § 3935.7, at 644 (2d ed. 1996) ("If almost any form of trial correction is susceptible to correction by appellate writ, courts of appeals remain most reluctant to grant writ review . . . .") The writ of mandamus will not be granted if a direct appeal is available, *Roshe v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed.1185 (1943), and courts are reluctant to grant it except in most exceptional cases. *See* 19 *Moore's Federal Practice*, § 204.03[1] (Matthew Bender 3d ed.1997). Even the majority in this case cautions that it must be employed "sparingly." Maj. op. at 93. Thus, I do not see the writ of mandamus as a satisfactory optional remedy.

–IV.

Considering the sanction here as appealable, I turn to a question that the majority did not have to consider but which I must in light of my conclusion that the appeal should not be rejected: Does the court have appellate jurisdiction to review the district court's order when the underlying litigation remains unresolved? Cannon and Blagg contend that we have jurisdiction pursuant to 28 U.S.C. § 158(d) because the district court's opinion is a final order. I agree.

Section 158(d) permits parties to appeal from "all final decisions, judgments, orders, and decrees" entered by the district court in bankruptcy matters. 28 U.S.C. § 158(d).

Generally, an order is "final" in an adversary action in the bankruptcy court only if it "ends the entire adversary proceeding 'on the merits and leaves nothing for the court to do but enter the judgment.'" *In re Unanue Casal*, 998 F.2d 28, 31 (1st Cir. 1993) (quoting *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987)); *see also In re Harrington*, 992 F.2d 3, 6 n. 3 (1st Cir.1993). The district court's opinion in the instant case only resolved whether the sanctions imposed against Cannon and Blagg were not erroneous. It did not resolve the merits of the underlying litigation; there is no question that the amount and dischargeability of Williams' federal income tax liability remains undecided.[13] Hence, the order is not final in the traditional sense.

Nonetheless, pursuant to *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and its progeny, appeal of a small class of what are customarily considered non-final orders is permitted. *See In re Unanue Casal*, 998 F.2d at 31 (*Cohen* doctrine applies in bankruptcy proceedings). *Cohen* established "the collateral order doctrine" and permits an appeal when the relevant order (1) involves an issue unrelated to the merits of the case, and which is capable of being reviewed without disrupting the main dispute, (2) constitutes a complete resolution of the issue and is not unfinished or inconclusive, (3) involves a right incapable of vindication on appeal from a final judgment, and (4) involves an important and unsettled question of controlling law. *See Appeal of Licht & Semonoff*, 796 F.2d 564, 570-71 (1st Cir.

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[13] Indeed, the district court recognized that the bankruptcy court orders were not final in the traditional sense when it permitted Cannon's and Blagg's appeals pursuant to 28 U.S.C. § 158(a)(3) which allows appeals of interlocutory orders only with permission. *See In re Williams*, 215 B.R. at 291.

1986); *see also In re Newport Sav. & Loan Ass'n* 928 F.2d, 474 (1st Cir. 1991) (citations omitted).

This court has not previously decided the issue presented in this case: whether an order sanctioning an attorney who no longer represents a party in the underlying dispute is immediately appealable. Our decision in *Licht and Semonoff*, however, offers some guidance. There, this court dismissed an immediate appeal of a sanctions order because the order was not final and did not fit within the collateral order doctrine recognized in *Cohen*. The court dismissed counsel's appeal because it did not meet the third element of the *Cohen* test; counsel would not be prevented from obtaining meaningful review of the sanctions order following termination of the litigation either by entry of final judgment or settlement, because he still continued to represent the plaintiff in the underlying litigation. 796 F.2d at 572. He remained involved in the proceedings and would have an opportunity to appeal the sanctions order following termination of the litigation.

In the instant case, there is no contention that Blagg ever represented the United States in the underlying dispute. Indeed, the bankruptcy court vacated its $750 sanction against him because he never entered an appearance on behalf of the United States. *See In re Williams*, 188 B.R. at 728-29. Cannon has also terminated his representation of the United States in the underlying matter.

In *Licht & Semonoff*, the court specifically refused to opine on the question raised by the facts of the instant case. *Id.* at 572. The court cited several cases which held that immediate appeal of a sanctions order is permitted under the collateral order doctrine when the sanctioned attorney ends his representation of the party in the underlying dispute. *See id.*

(collecting cases). With regard to those cases the court stated: "We express no opinion as to the appealability of sanctions against a nonparty or an attorney no longer litigating the case . . . ." 796 F.2d at 572. The cases cited there permit review under the collateral order doctrine because the withdrawing attorney, by virtue of his lack of notice of the progress of the litigation, might lose his right to appeal. He may not be notified of the entry of a final judgment in time to take an appeal. Also, an immediate appeal would not disrupt the progress of the underlying dispute. *See, e.g., Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 539 (3d Cir.1985); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1172 (D.C. Cir. 1985); *see also Licht & Semonoff*, 796 F.2d at 572 (collecting cases.)[14]

Because Blagg and Cannon do not represent the Government in the underlying litigation, there is a strong likelihood that they will lose their right to obtain review of the orders if it is not done immediately. Neither has a right to be notified of the progress of the underlying litigation or its settlement. Thus, there is a strong likelihood that the litigation will terminate without notice to them, resulting in the loss of their appellate rights. *See Eavenson*, 775 F.2d at 539. Moreover, I discern no impediment to the underlying litigation by allowing this appeal

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[14] Several Circuit Courts of Appeals have adopted this rationale, holding that orders imposing sanctions against an attorney are immediately appealable as collateral orders when the sanctioned attorney no longer represents a party in the underlying dispute. *See, e.g., In re Tutu Wells Contamination Litig.*, 120 F.3d 368, 378-79 (3d Cir. 1997); *Chaves v. M/V Medina Star*, 47 F.3d 153, 155-56 (5th Cir. 1995); *Westmoreland*, 770 F.2d at 1172; *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 226 (7th Cir. 1984). *But see Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 436-37 (10th Cir. 1995) (order sanctioning attorney is capable of being reviewed on appeal), *cert. denied*, — U.S. —, 117 S.Ct. 484, 136 L.Ed.2d 378 (1996).

of the sanctions to proceed at this time. Finally, the appeal raises important questions of law. The appeal, therefore, satisfies the *Cohen* test.

V.

In sum, I would allow the appeal and hold that under the *Cohen* test the published reprimand is immediately appealable. Thus, I would review the case on the merits.

For the foregoing reasons, I therefore respectfully dissent.

APPENDIX B

Lawrence G. WILLIAMS,
Plaintiff, Appellee,

v.

UNITED STATES, Defendant, Appellee.

William L. Blagg, Defendant, Appellant.

Lawrence G. WILLIAMS,
Plaintiff, Appellee,
v.
UNITED STATES, Defendant, Appellee,

Charles J. Cannon, Defendant, Appellant.

Nos. 97-2437, 97-2438.

United States Court of Appeals,
First Circuit.

Oct. 16, 1998.

BEFORE: TORRUELLA, Chief Judge, CAMPBELL, ROSENN*, Senior Circuit Judges, SELYA, BOUDIN, STAHL, LYNCH, & LIPEZ, Circuit Judges.

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* Of the Third Circuit, sitting by designation.

ORDER OF THE COURT

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearsing and the suggestion for rehearing en banc be denied. Published dissent by Judge Lynch with Chief Judge Torruella and Judge Lopez joining in is attached.

LYNCH, Circuit Judge, dissenting.

I respectfully dissent from the denial of the request for rehearing en banc. I believe that this case involves a question of exceptional importance which should be addressed by the full court. *See* Fed.R.App.P. 35(a).

A published reprimand is a punishment that is in many cases far more serious than the imposition of monetary sanctions. Reputational damage alone may be worse for a lawyer than any monetary sanction. Indeed, if pecuniary effects are accepted as the test, a reprimand itself may have long-lasting effects on a lawyer's earning ability far worse than an individual monetary sanction. Being branded unethical or incompetent by a federal judge can essentially destroy a lawyer's career. *See Walker v. City of Mesquite*, 129 F.3d 831, 832-33 (5th Cir. 1997).

Despite these harsh realities, there are few checks on what judges say about counsel other than the judge's own prudence. A lawyer attempting to pursue a client's interests zealously

may, if faced with an arbitrary judge or a judge who has an erroneous view of the facts, end up with a blot on his or her record that will never be erased—unless an appeal is possible to correct the problem.

The majority acknowledges these concerns, but focuses the appealability inquiry on whether a judge's words "are expressly identified as a reprimand." *In re Williams*, 156 F.3d 86, 92-93 (1st Cir. 1998). However, if a lawyer's ability to fight reputational damage is dependent on a judge's labeling of an order, then judges who wish to evade appellate review will find it easy to do so. This sort of formalism, which has been abandoned in so many areas of the law, *see, e.g., id.* at 95-96 (Rosenn, J., dissenting) (noting that order, not labeled injunctions may nonetheless be appealable under 28 U.S.C. § 1292(a)(1) if they have injunctive effect), seems especially inappropriate in an area in which the premise of any appeal is likely to be the assertion that the order was issued by an intemperate decisionmaker.

Although the countervailing policy concerns expressed in the panel decision are forceful and significant, *see Williams*, 156 F.3d at 91-93 (citing *Bolte v. Home Ins. Co.*, 744 F.2d 572, 573 (7th Cir. 1984)), much of their force depends on the assumption that a finding of appealability in this case would make almost any negative comment by a trial judge subject to appeal. However, as pointed out by the dissent and the petition for rehearing, limiting principles are available. For instance, appealability could be limited to published reprimands that are issued in the context of a decision on the imposition of sanctions. *See id.* at 97-98 (Rosenn, J., dissenting); Petition for Rehearing and Suggestion for Rehearing En Banc at 6-8. These sorts of limits would ensure that judges' ability to run their courtrooms and manage their caseloads remains unimpaired.

Further, defining a certain limited class of reprimands as appealable under 28 U.S.C. § 1291 and § 158(d) is unlikely to prompt a flood of new appeals to this already busy court. Any lawyer appealing a reprimand takes the risk that this court, reaching the merits, will agree that the sanction is justified—thus giving the sanction far more force than it would have had if it had come from a trial judge unendorsed by a reviewing court. Accordingly, the lawyer's self-interest dictates that an appeal be taken only in cases in which the sanction is particularly damaging to a lawyer's reputation and particularly undeserved.

Even if appeals in this area arise infrequently, however, the very possibility of review will act as a check on judges who may be too free to issue unwarranted reprimands. The availability of mandamus, an exceedingly narrow avenue for appellate oversight, *see, e.g., United States v. Horn,* 29 F.3d 754, 769 (1st Cir. 1994), will simply not serve this prophylactic purpose.

For these reasons, I dissent from the denial of review en banc.

APPENDIX C

In re Lawrence G. WILLIAMS, Debtor.

Lawrence G. WILLIAMS

v.

UNITED STATES of America.

No. CA 96-006ML.

United States District Court,
D. Rhode Island.

Nov. 5, 1997.

MEMORANDUM OPINION

LISI, District Judge.

This is an appeal of sanctions imposed on two government attorneys, Charles J. Cannon and William L. Blagg, by the United States Bankruptcy Court for the District of Rhode Island. In addition to levying a $750 monetary discovery sanction against each, the bankruptcy court published factual findings pertaining to the conduct of the two attorneys during the discovery process. Additionally, the bankruptcy court enjoined both from seeking reimbursement from their employer, the United States. On reconsideration, the bankruptcy court vacated the monetary sanction as to appellant Blagg, but affirmed the sanction against appellant Cannon, and refused to withdraw its adverse findings of fact. Both attorneys now appeal the bankruptcy court's judgment on due process grounds.

They are accompanied in their appeals by the United States, the Attorney General, and the Secretary of the Treasury (hereafter collectively referred to as the government appellants), who separately argue that the nonreimbursement order violates the separation of powers. This court has taken jurisdiction pursuant to 28 U.S.C. § 158(a)(3).

I. OVERVIEW AND PROCEDURAL HISTORY

Despite a complicated veneer, this case is not quite so mystifying as might first appear. It is the product of a set of inartfully drawn discovery requests, a series of broken promises, a pair of bruised egos, and the understandable frustration of a bankruptcy judge whose patience over the course of already protracted proceedings was exhaustively tested. It is now the duty of this court to set the record straight.

A. Background

In 1991, Lawrence G. Williams, a debtor in bankruptcy, filed an adversary proceeding seeking a determination of his federal tax liability for the tax years 1978 through 1988 and 1990. Initially, the Internal Revenue Service (IRS) claimed a deficiency of nearly $6.6 million, including delinquent taxes, penalties, and interest. This figure was based, in significant part, on the disallowance of substantial deductions taken from losses in various partnerships in which the debtor invested. Of central importance in the adversary proceeding, now pending, are the validity of these deductions.

Apparently, Williams was one of thousands of limited partners in a group of fifteen tax shelters known as the Arbitrate Management Partnerships (AMPs). Through the acquisition of straddle positions in repurchase agreements and U.S. Treasury

bill options, the AMPs aimed to pass substantial losses on to their investors. In time, however, the AMPs failed, and the Internal Revenue Service (IRS) sought to audit the AMPs and their respective general and limited partnership interests. However, because the streamlined auditing procedures pursuant to the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub.L. 97-248, § 402(a), 96 Stat. 648, codified at 26 U.S.C. §§ 6221-31, were unavailable for the tax years preceding TEFRA's effective date, the United States Tax Court supervised an initiative to resolve all of the related tax deficiencies on a consolidated basis (hereafter, the tax court proceedings).[1]

In 1987, the tax court assigned a team of three negotiators to represent the various interests concerned in the hope that they could select one or more test cases for litigation and/or negotiating a settlement. Of some significance, appellant Blagg represented the IRS in those proceedings, and Dennis L. Stein, the debtor's counsel, represented one of the general partner's interests.[2]

Early in 1988, the negotiators informed the tax court that a tentative settlement had been reached. On February 7, 1989, the IRS wrote to the debtor advising him of the settlement offer and outlined the procedures by which he could accept it. The debtor has put in issue in the underlying adversary proceeding whether or not he accepted the government's offer to settle any tax liability arising out of his investments in the AMPs. From

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[1] The TEFRA procedures enable the IRS to audit partnerships, such as the AMPs, and enter into settlements with their constituent partners without necessitating an audit of each partner individually.

[2] The parties "stipulated" that through the course of the AMPs litigation, Stein and Blagg had developed an "acrimonious" relationship.

his point of view, this issue is of considerable importance, for if he effectively accepted an offer of settlement, he asserts that his potential exposure may be greatly reduced or eliminated by virtue of the applicable statute of limitations.

On or about April 30, 1991, the debtor served a request for the production of documents pursuant to Bankruptcy Rule 7034 and Rule 34 of the Federal rules of Civil Procedure. Specifically, he sought four broad categories of documents:

> 1. Documents relating to all extensions of statute of limitations for both Lawrence G. Williams individually and for any partnership in which Lawrence G. Williams was a general or limited partner for the tax years 1978 to the present;
>
> 2. All tax returns filed with the Internal Revenue Service by Lawrence G. Williams from 1978 to the present;
>
> 3. All workpapers developed or used in connection with any audits of tax returns filed by Lawrence G. Williams from 178 to the present; and
>
> 4. All internal correspondence and other internal documents regarding tax returns filed with the Internal Revenue Service by Lawrence G. Williams from 178 to the present.

The government did not timely serve its response to these requests.

Exactly five days after the government's response was due, that is to say, on June 7, 1991, the debtor moved to compel

production of documents pursuant to Fed.R.Civ.P. 37(a).[3] On June 18, 1991, the government served objections to the debtor's requests on the basis that they were overbroad, burdensome, and sought privileged material. Thereafter, the government filed a timely objection to the debtor's Rule 37(a) motion, the substance of which was that it served a response to the debtor's requests, which, albeit untimely, mooted the Rule 37(a) issue.

The bankruptcy court held two hearings on the debtor's motion to compel. The first was in 1991. A docket entry that July notes, "IRS needs more time to produce information." A second hearing was held the following January, 1992. There, the bankruptcy court considered the government's specific objections on their merits and overruled them. By order dated January 14, 1992, the bankruptcy court ordered that "the government produce all of the requested documents within forty-five days. . . ." This deadline was to expire on February 28, 1992.

On February 25, 1992, within the period prescribed by the court, the government sent the debtor a collection of documents. Delivered under two separate covers, the government stated its belief that "this . . . completes the

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[3] Appellants suggest that the debtor violated a local rule requiring counsel to confer before seeking judicial intervention to resolve discovery disputes. Presumably, appellants are referring to Local Rule 13(d) which requires counsel to attempt to settle objections to discovery by agreement. *See* D.R.I. Loc. R. 13(d). Of course, at that point in time, the government had not served any objections to the debtor's requests. However, to the extent that the debtor jumped the gun in moving to compel, *see* Fed.R.Civ.P. 37(a)(2)(A) (requiring certification that "movant has in good faith . . . attempted to confer with party not making disclosure in an effort to secure disclosure without court action"), the government did not raise any procedural deficiency to the bankruptcy court, and this court deems the issue waived.

production of documents as ordered by the court." Not included in this response, however, were certain consents to extend the statute of limitations executed by either the debtor or by the various partnerships in which he had invested (hereafter, "the consents"), or documents concerning audits of these partnerships (hereafter, "the partnership audit files). The debtor complained about the government's failure to produce these documents for the first time in a motion for partial summary judgment filed in April, 1992.

In his motion, the debtor argued that for each year that the government did not produce a consent, it was time-barred from seeking a deficiency. He also argued that because the government had not produced the partnership audit files, it could not prove any tax deficiency in connection with his partnership investments. The government responded that it had, in fact, produced most of the requested consents.[4] With respect to the partnership audit files, the government disputed that it failed to produce requested documents. However, it did argue, to the extent these files were not produced, that summary judgment was in inappropriate remedy. It suggested that the debtor could more properly find a remedy for nonproduction in a motion for preclusion. The bankruptcy court denied the debtor's motion on May 8, 1992.

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[4] The record is somewhat unclear on whether or not all of the requested consents were made part of the government's February 25, 1992 shipment of documents. Attached as exhibits to the government's response to Williams' motion for summary judgment, served April 29, 1992, was a set of consents (IRS Form 872-A) for the tax years 1978, 1979, 1980, 1981, 1982, 1985, 1986, and 1987. Moreover, the government submitted copies of executed powers of attorney (IRS Form 2848) for each of the tax years 1978 through 1987. Although the nonproduction of any of these materials could have formed the basis for sanctions by the bankruptcy court, it is clear that the partnership audit files were the basis for the court's decision, and this court limits its review to the issues relating to these items.

On May 20, 1992, seemingly at the government's cue, the debtor filed a motion to preclude. This motion bore great similarity to the preceding summary judgment motion. In support thereof, attorney Stein filed an affidavit resembling a memorandum of law which stated that the government had not turned over the partnership audit files, which, "[p]resumably . . . constitute the universe of documents responsive to [the April 30, 1991] request." Ex. 3 at 2. Accordingly, Stein opined that the government should be precluded from introducing any materials contained within these files because they were not produced in accordance with the bankruptcy court's January 14, 1992 order.

The government timely responded to this motion on June 12, 1992. It explained that the reason why it did not produce any of the documentary materials contained in the partnership audit files was because, with the exception of those documents pertaining to the extension of the applicable statute of limitations, the debtor had never requested any partnership-related materials. This response sparked a supplemental affidavit from Stein which, for the first time, raised questions of fact regarding certain representations or admissions by the government's counsel, who, at that time, was appellant Charles J. Cannon. Thereafter, at the joint request of the parties, the bankruptcy court granted a series of extensions and continuances during which time, as this court understands it, the parties endeavored to negotiate a settlement. These delays postponed a hearing on the preclusion issue for nearly two and one-half years, that is, until January, 1995.

B. The January 1995 Hearing

In preparation for the hearing on preclusion, the parties filed a, so-called, joint "pre-trial" memorandum.[5] Signed by counsel for both parties, this pleading directed the bankruptcy court to the issues of fact in dispute. The government acknowledged that among the issues for the court to decide were:

> Whether the government acted with diligence in securing from the Internal Revenue Service the documents responsive to the Request. . . . Whether the government was at fault in failing to produce in this preceding the documents responsive to the requests and required to be produced pursuant to the January 4, 1992 [sic] Order. . . . Whether the government has acted in good faith in responding to the Order to produce documents.

Moreover, the parties directed the court to the ultimate issue of law,

> Whether the appropriate sanction to be imposed against the Government . . . should be the striking of its pleadings, or some other sanction pursuant to Rule 37(b) of the Federal Rules of Civil Procedure and Rule 7037(b) of the Bankruptcy rules.

The parties identified as potential witnesses appellants Cannon and Blagg as well as attorney Stein. Additionally, they listed a host of exhibits for use at the hearing, all pertaining to the issue

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[5] Of course, the bankruptcy court held a "hearing" on this matter rather than a "trial." To avoid confusion, the court continues to employ the imprecise term "trial" as it is the label affixed both by the parties and the court below.

of offer and acceptance and presumably contained in the contested partnership audit files.

At the outset of the hearing the government suggested that the court entertain the merits of the offer and acceptance issue. The debtor vehemently objected to this suggestion as the contested discovery, counsel asserted, went to the essence of that issue. And while the bankruptcy court resolved to try only the discovery dispute, the parties did not focus on the operative date, February 28, 1992, but instead led the court on a wild frolic of what transpired in the two and one-half years between May, 1992 and January, 1995. As to these events, the bankruptcy court heard evidence of the following.

Shortly after receiving the debtor's motion to preclude, Cannon contacted Blagg to ask for his assistance in locating all of the partnership audit files. Blagg, a staff attorney with the IRS, had been assigned the debtor's case and was familiar with it as early as May, 1992. Blagg testified to the bankruptcy court that the purpose for his involvement in the case was to locate and respond to the debtor's document requests. Blagg had represented the IRS in the AMPs litigation and had an extensive knowledge of the whereabouts and contents of the various partnership audit files.

In June, 1992, Cannon and Blagg met to discuss the substance of the debtor's requests. Thereafter, on or about June 30, 1992, Cannon met with Stein to discuss disclosure of these materials. Although Cannon told Stein that he had not yet made any effort to secure the partnership audit files from the IRS, he informally promised "anything he had [Stein] could see." By that time, Cannon was fully aware of what Stein was seeking or, at least, believed he had requested, that is, all partnership-related materials bearing on a settlement of the

government's claim and materials germane to the calculation of the debtor's tax deficiency. The bankruptcy court heard undisputed evidence that Cannon renewed this promise on several occasions, each time reassuring Stein that he would produce all nonprivileged documents in the government's possession. Apparently, Stein took Cannon at his word and did not press the pending motion to preclude the introduction of this evidence.

A month later, Stein received a letter from the Department of Justice, dated July 30, 1992, which confirmed that the government would make available all documents contained in the partnership audit files. The letter described "thousands of pages" occupying "10 linear feet of lateral file space" that Stein would be permitted to review at the IRS District Counsel's office in New York City. The latter also stated that Stein's photocopying needs would be accommodated so long as they would not interfere with the IRS's normal operations. Stein was instructed to make arrangements with Cannon. Cannon, in turn, referred Stein to Blagg.

Over the course of the next several months, Stein attempted to contact Blagg to arrange an opportunity to view the elusive partnership audit files, but Blagg did not return his calls. The bankruptcy court heard evidence that Stein left a message for Blagg "every day or second day," amounting to over one hundred messages in all. Once Stein succeeded in contacting Blagg, it quickly became apparent that Blagg had a different understanding of which documents Stein would be permitted to see than Cannon had let Stein to believe. Finally, on October 30, 1992, Stein requested in writing that Cannon make the necessary arrangements with Blagg.

On November 12, 1992, Stein was permitted to view the "ten linear feet." These papers were neither indexed nor Bates stamped, and not all of the files for all of the partnerships in which the debtor had invested were there. Blagg said that he was still locating certain files.

At the end of his inspection, Stein selected a small stack of documents which he asked be photocopied. Blagg said that he would ask his secretary to copy and send the documents in a short time. Stein did not receive these documents for some three months.

Following his trip to the District Counsel's office, Stein notified Cannon that the audit files for some of the debtor's investments were not among the files made available. In a letter dated November 30, 1992, Stein submitted to Cannon an "Items Missing" list, which set forth, in detail, eleven documents he was seeking and to which of the debtor's partnership investments each document pertained. Among the documents listed were documents generated in connection with the settlements of the AMPs. Stein called these documents "crucial." Cannon again called Blagg.

On January 13, 1993, Blagg wrote Cannon stating that he would need another four months to locate all of the missing items. With respect to the AMPs settlement negotiation documents, in particular, Blagg stated that he was unaware of any additional documents which would have been "relevant to this issue." In actuality, closer to a year passed before the "relevant" but "missing" documents were produced. Blagg did not describe to the bankruptcy court any serious effort on his part to obtain these items in a timely fashion. Although the bankruptcy court did not endeavor to decide the government's motives for not producing the partnership settlement documents,

it did find that Cannon and Blagg, both, had not produced documents as it had ordered on January 14, 1992.

C. The Bankruptcy Court's Findings and Conclusions

By order dated April 14, 1995, the bankruptcy court found that the government "repeatedly and deliberately violated Rule 37(b)." *See Williams v. United States (In re Williams)*, 181 B.R. 1, 2 (Bankr.D.R.I. 1995) ("*Williams I*"), *vacated and amended in part by* 188 B.R. 721 (Bankr.D.R.I. 1995) ("*Williams II*"). In arriving at this conclusion, the bankruptcy court described the government's conduct, by and through its agents, Cannon and Blagg, as "egregious," "autocratic," "bureaucratic, "disdain[ful]," and overall, "intentional, unprofessional and unjustified." *Id.* at 2-5. Suffice to say, the bankruptcy court's first decision and order left little doubt as to its belief that both Cannon and Blagg had acted in bad faith and flouted its order compelling the production of documents. *See id.* Much of the court's venom was directed at appellant Blagg.

Although this court need not rehash the bankruptcy court's opinion in its entirety, among the more stinging of the court's assessments was that Blagg had done "his best . . . to obstruct the Plaintiff's discovery." *Id.* at 4. This finding was anchored on Blagg's conceded failure to return Stein's phone calls and the three month delay in photocopying and mailing the documents selected in November, 1992. *See id.* at 3-4. With respect to the latter incident, the court found that Blagg had unprofessionally attempted to shift the blame upon his secretary, suggesting "Mr. Bragg should have . . . rolled up his sleeves and made the copies himself. . . . ." *Id.* at 4. Moreover, the court expressed "irreconcilable difficulty" with Blagg's incomplete and unindexed production in November, 1992, and interpreted his January 13, 1993 letter to Cannon as a

"unilateral extension of court imposed deadlines" and a usurpation of the court's authority to determine what is "relevant" in discovery. *Id.* at 5.

With regard to appellant Cannon, the court was hardly more charitable. Finding that he had "waited over one year to forward to the Plaintiff documents that were continuously in his possession," the court graded "his performance and credibility at about the same level as that of [Blagg] . . . even though his manner may not be as abrasive." *Id.* Purportedly pursuant to Rule 37(b), the court sanctioned both lawyers $750 personally and enjoined them from seeking reimbursement from their employer, the United States. *See id.* at 5. Cannon, Blagg, and the government appellants all took exception to this order.

Immediately following the April 14, 1995 order, Cannon and Blagg, joined by the government appellants, moved that the bankruptcy court reconsider its decision. Blagg and Cannon each submitted affidavits setting forth additional facts which they believed were not brought to light at the January hearing. On reconsideration, the parties collectively argued that the bankruptcy court exceeded its authority, that Blagg and Cannon were denied fair notice and the opportunity to be heard, that the nonreimbursement injunction violated the separation of powers, and that many of the court's findings were factually erroneous. Prior to a hearing on this motion, the Justice Department requested that the court informally meet with Cannon, Blagg, and their attorneys to discuss, among other things, whether in light of Cannon's and Blagg's post-judgment declarations the court's view of their conduct remained the same. This request was summarily denied.

In due course, the bankruptcy court did reconsider its initial judgment. In a second published decision, the bankruptcy court

explained the basis for its jurisdiction, the notice and the hearing provided, and its authority to sanction government lawyers personally. *See Williams II*, 188 B.R. at 727-31 (citing *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370-71 (9th Cir. 1980)). Additionally, it acknowledged and corrected certain factual errors, but specifically refused to take into account the attorney's post-judgment affidavits. *See id.* at 725-27. These, the court discredited as "meritless afterthoughts" and "after-the-fact reminiscences." *Id.* at 726.

Although the court expressed uncertainty whether Blagg was subject to the court's Rule 37 sanctioning powers, it decided to "err on the side of conservatism" because Blagg had not formally entered an appearance. *Id.* at 727. Accordingly, the court did vacate the monetary sanction it had imposed on Blagg for lack of personal jurisdiction over him. *See id.* Nevertheless, the court was unambiguous that despite "a very close call" on the jurisdictional question, it left its "findings and conclusions regarding Mr. Blagg's conduct and demeanor . . . intact." *Id.* at 728.

D. Basis for Appeals

Now, Cannon and Blagg, accompanied by the government appellants, appeal the amended judgment of the bankruptcy court, Cannon argues that the $750 monetary sanction remaining against him constitutes a punitive, criminal fine beyond the authority of an Article I court to impose. Additionally, he argues that the bankruptcy court impermissibly sanctioned him pursuant to Rule 37(b)(2) for actions not in violation of any freestanding discovery order and, equally, that the basis for such sanctions is not supported by the record facts. Finally, Cannon asserts that he was deprived of due process because the bankruptcy court did not fairly apprise him in

advance that sanctions might be imposed against him personally and that, in failing to consider his post-judgment declaration, it denied him any opportunity to be heard as to his personal culpability in this affair.

Blagg, no longer subject to any monetary sanction, appeals from the bankruptcy court's findings and conclusions. He asserts that the court's factual findings constitute a sanction in and of themselves. He, like Cannon, maintains that he was denied notice and an opportunity to be heard on the issue of his personal culpability. However, he further asserts that he appeared at the hearing merely as a witness and, thus, the court lacked personal jurisdiction over him, a non-party in the case. Among other relief requested, he petitions this court to issue mandamus to the bankruptcy judge to withdraw his published opinions.

Finally, the government appellants press their argument that the bankruptcy court unlawfully interfered with their constitutional grant of authority and discretion by purporting to enjoin their employees from seeking reimbursement for expenses incurred in the course of their official duties. The court sets aside for the moment the merits of this argument as it presents issues ancillary to the appeals of Cannon and Blagg.

II. DISCUSSION

A. Appellate Jurisdiction

Before embarking on any discussion of the merits of these appeals, it is incumbent on this court to establish that it may exercise jurisdiction over this matter. *See Petralia v. AT&T Global Information Solutions Co.*, 114 F.3d 352, 353-54 (1st Cir. 1997). "Jurisdiction can never be assumed by must be

premised on some affirmative source.'" *Doughty v. Underwriter's at Lloyd's, London* (*In re Wallis*), 6 F.3d 856, 860 (1st Cir. 1993). Initially, this court expressed concerns that it was without authority to entertain this appeal at all. At the request of the court, appellants separately briefed and argued this court's jurisdiction, and, by order dated September 30, 1996, the court granted leave to appeal pursuant to 28 U.S.C. § 158(a)(3). It now states its reasons for doing so.

As an initial matter, the court observes that many courts have recognized that publicly reprimanding an attorney in a judicial opinion may operate as a sanction. *See, e.g., Bank of Nova Scotia v. United States,* 487 U.S. 250, 263, 108 S.Ct. 2369, 2378, 101 L.Ed.2d 228 (1988); *United States v. Hasting*, 461 U.S. 499, 506 n. 5, 103 S.Ct. 1974, 1979 n. 5, 76 L.Ed.2d (1983); *In re Ames Dep't Stores, Inc.*, 76 F.3d 66, 69 (2d Cir. 1996); *United states v. Horn*, 29 F.3d 754, 758 n. 1 (1st Cir. 1994); *United States v. Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992), *cert. denied*, 507 U.S. 985, 113 S.Ct. 1581, 123 L.Ed.2d 148 (1993). Although there is no constitutionally protected interest in one's reputation, *see Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 1165-66, 47 L.Ed.2d 405 (1976), some courts have found that a published reprimand of an attorney confers standing in that attorney to appeal injurious findings of fact, see *Fromson v. Citiplate, Inc.* 886 F.2d 1300, 1304 (Fed. Circ. 1989), *Penthouse Int'l, Ltd. v. Playboy Enters., Inc.*, 663 F.2d 371, 373 (2d Cir. 1981). This court does not disagree that there is a point where judicial criticism turns to operate as a serious sanction and acknowledges that an overly harsh or unfounded published reprimand may warrant appellate review in come circumstances. Cf. *FDIC v. Tekfen Constr. and Installation Co.*, 847 F.2d 440, 444 (7th Cir. 1988) ("a lawyer's reputation for integrity, thoroughness and competence is his or her bread and butter" and "[w]e may not

impugn that reputation without carefully analyzing the legal and factual sufficiency of the arguments."). However, whether interlocutory appellate review should be made available is an entirely separate question.

There are generally two avenues to appeal an order of a bankruptcy court. *See Northeast Savs. F.A. v. Geremia (In re Kalian)*, 191 B.R. 275, 277 (D.R.I.1996). First, an aggrieved party may appeal "from the final orders, judgments, and decrees" of a bankruptcy court as a matter of fight pursuant to 28 U.S.C. § 158(a)(1). At the same time, a district court, in its discretion, may grant leave to appeal "other interlocutory orders and decrees" of a bankruptcy court. 28 U.S.C. § 158(a)(3). Unfortunately, there are no standards set out either in the statutes or the rules governing a district court's exercise of its discretionary power to grant leave to appeal an interlocutory order of a bankruptcy court. *See In re American Colonial Broad. Corp.*, 758 F.2d 794, 801 n. 7 (1st Cir. 1985); *Northeast Savs.*, 191 B.R. at 277. However, the perimeters of a district court's appellate jurisdiction are generally informed by the same policy considerations as guide the courts of appeals in avoiding piecemeal litigation, promoting judicial efficiency, and eliminating delays caused by protracted interlocutory appeals.

In *Appeal of Licht & Semonoff*, 796 F.2d 564 (1st Cir. 1986), the First Circuit decided that monetary discovery sanctions imposed on an attorney are generally nonfinal orders. *See id.* at 570. Because they can always be rescinded or compromised during the pendency of an action, the *Licht* court held that monetary discovery sanctions should not be immediately appealable until entry of judgment in the underlying case. *See id.* If all there were to this case was the monetary sanction, *Licht* would squarely counsel against interlocutory review. However, because the bankruptcy court's

remarks threaten injury of a continuing nature, this court found that it must depart from *Licht* and exercise its discretion to entertain this appeal pursuant to 28 U.S.C. § 158(a)(3).[6]

While the court is reluctant to create piecemeal litigation, it does recognize that bankruptcy proceedings can extend over a period of years. The First Circuit itself has acknowledged that the bankruptcy context requires a more flexible view of finality. *See In re American Colonial Broadcasting*, 758 F.2d at 801.

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[6] Indeed, many district courts, including this one, have analogized the standards governing permissive appeals under § 158(a)(3) to the procedures for certification of interlocutory appeals pursuant to 28 U.S.C. § 1292(b). *See, e.g., Northeast Sav.*, 191 B.R. at 277; *In re Giguere*, 188 B.R. 486, 488 (D.R.I. 1995); *In re Dino's, Inc.*, 183 B.R. 779, 781 (S.D. Ohio 1995); *In re IBI Security Serv., Inc.*, 174 B.R. 664, 669-71 (E.D.N.Y. 1994). This analogy, albeit useful, is not perfect.

The procedures set forth in § 1292(b) are not similarly contained in § 158(a)(3). Utilization of the § 1292(b) certification process by district courts before hearing an appeal from a bankruptcy court is therefore jurisprudential and not jurisdictional. *See In re Huff*, 61 B.R. 678, 682 n. 6 (N.D.Ill. 1986). After all, a bankruptcy court's power to "hear and determine cases under title 11" is originally derived from a reference by a district court. 28 U.S.C. § 157(b). This reference may be withdrawn by the referring district court "in whole or in part . . . on its own motion. . . . ." 28 U.S.C. § 157(d). As the Third and Seventh Circuits have both recognized, it is doubtful that congress intended to grant district courts plenary authority over bankruptcy cases generally, implicit in the authority to withdraw a reference *sua sponte*, while at the same time restricting district courts' authority over interlocutory appeals. *See Fruehauf Corp., v. Jartan, Inc. (In re Jartran)*, 886 F.2d 859, 866 (7th Cir. 1989); *Bertoli v. D'Avella (In re Bertoli)*, 812 F.2d 136, 139 (3d Cir. 1987). Thus, while strict adherence to the § 1292(b) procedures comports with sound policy, the language of § 158(a)(3) obviously vests broader discretion in the district courts to permit interlocutory appeals, including circumstances where "serious, perhaps irreparable consequences[s]" are threatened which can be "effectually challenged only by immediate appeal." *Carson v. American Brands, Inc.*, 450 U.S. 79, 84, 101 S.Ct. 993, 997, 67 L.Ed.2d 59 (1981) (quotations omitted).

Although the court cannot overstate the maxim that permissive appeal should be made available "'sparingly and only in exceptional circumstances,'" it finds that the combination of threatened, continuing injury over a prolonged period of time justifies the exercise of the court's discretion in this case. *Northeast Sav.*, 191 B.R. at 278 (quoting *McGillicuddy v. Clements*, 746 F.2d 76, 76 n. 1 (1st Cir. 1984)). Moreover, the merits of this appeal neither slows or affects the progress of the proceedings below. It is for these reasons the court granted appellants leave to appeal.[7]

B. Standard of Review

Having concluded that this court may exercise jurisdiction over this matter, it is necessary that this court delineate the appropriate standard for its review. The imposition of sanctions is generally reviewed only for abuse of discretion. *See Chambers v. NASCO, Inc.* 501 U.S. 32, 55, 111 S.Ct. 2123, 2138, 115 L.Ed.2d 27 (1991) (exercise of inherent authority); *national Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 2780-81, 49 L.Ed.2d 359 (1990). However, absent these latter types of mistakes, the choice and severity of the sanction imposed is a matter reserved to the sanctioning court's discretion as it is far better situated to evaluate the evidence presented and to apply the appropriate legal standards. *See Whitney Bros. Co. v. Sprafkin*, 60 F.3d 8, 12 (1st Cir. 1995); *Kale v. Combined Ins. Co.*, 861 F.2d 746,

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[7] In granting appellants' motion, the court was primarily concerned with the bankruptcy court's published findings. However, because the monetary sanction is so interrelated with the issues posed by the published criticisms, the court exercises pendent appellant jurisdiction over the $750 monetary sanction. *See In re Tutu Wells Contamination Litigation*, 120 F.3d 368, 382 (3d Cir. 1997); 16 Wright, Miller & Cooper, Federal Practice and Procedure, § 3937, at 690-96 (2d ed. 1996).

758 (1st Cir. 1988). Thus, this court's inquiry is not whether it would have employed the same measures, but whether the bankruptcy court's actions can be legally justified in light of the circumstances presented.

C. Due Process

Appellants Cannon and Blagg both invoke the fundamental principles of due process in arguing that they were deprived of notice and an opportunity to be heard before the bankruptcy court took adverse judicial action against them. They claim the court below ambushed them by not stating advance that it intended to sanction them personally, either monetarily or by published reprimand. Consequently, they argue that they had no meaningful opportunity to defend themselves in their personal capacities. The bankruptcy court call these contentions "borderline frivolous." *Williams II*, 188 B.R. at 728. This court is inclined to agree.

While there is indeed "no principle . . . more fundamental to our system of judicial administration than that a person is entitled to notice before adverse judicial action is taken against him," *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 608 (1st Cir.), *cert. denied*, 516 U.S. 814, 116 S.Ct. 65, 133 L.Ed.2d 27 (1995), this court has a hard time accepting that Cannon and Blagg were deprived of either effective notice or a forum in which to respond to the allegations for their respective roles in this affair. The debtor timely served on the government a motion to preclude averring that the government failed to produce the partnership audit files in violation of a court order. Although the motion was not also captioned by the accessory language "pursuant to Bankruptcy Rule 7037 and Fed.R.Civ.P. 37(b)," the motion was unmistakably one for sanctions.

In preparation for the hearing on the motion, the government filed a pretrial memorandum, signed by appellant Cannon, which acknowledged that the nonproduction of the partnership audit files was in issue and that the bankruptcy court would be making factual findings as to the government's "diligence," "fault," and "good faith." The pretrial memorandum also recognized that the debtor was seeking preclusion as a sanction or "some other sanction pursuant to Rule 37(b) of the Federal Rules of Civil Procedure and Rule 7037(b) of the Bankruptcy Rules." It is simply incredible that Cannon, of all people, can assert he was not on notice of the nature of the allegations set for hearing. Documents do not produce themselves. Allegations of bad faith government misconduct necessarily implicates the conduct of the government actors involved, and there is nothing novel in sanctioning attorneys personally for discovery abuse.

Blagg hardly stands on more solid ground. He was assigned and accepted an integral role in collecting the documents. He acted as the liaison between the IRS and debtor's counsel. He attended the hearing as the designated representative of the IRS, and, in this capacity, was represented by Cannon. This court is unpersuaded, given Blagg's level of involvement in this case--a case in which he knew he was being called to testify--that he had no notice that the court might assign some level of responsibility to him personally. He knew that the debtor averred that the partnership audit files had not been produced, and he knew that the court would be most interested to know, if this allegation were proven true, why.

Notwithstanding clear and obvious notice that sanctions were under consideration, appellants assign error to the bankruptcy court because it did not inform them in advance of the measures it intended to take. They assert that courts must

give particularized notice before imposing any type of sanction. For this proposition, they rely on *Simmerman v. Corino*, 27 F.3d 58 (3d Cir.1994).

In *Simmermans*, the court held that prior to the imposition of sanctions, a party is *per se* entitled to particularized notice of

> (1) the fact that . . . sanctions are under consideration, (2) the reasons why sanctions are under consideration, and (3) the form of sanctions under consideration.

Id. at 64. This principle is now well established in the Third Circuit, *see, e.g., In re Tutu Wells*, 120 F.3d at 379; *Martin v, Brown*, 63 F.3d 1252, 1262-63 (#d Cir. 1995), and finds support elsewhere as well, *see Jensen v. Federal Land Bank of Omaha*, 882 F.2d 340, 341 (8th Cir. 1989); *Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc.*, 834 F.2d 833, 836 n. 5 (9th Cir. 1987). However, the court does not find this principle to be in accordance with the precedent of this circuit.

In *Media Duplication Servs., Ltd. v. HDG Software, Inc.*, 928 F.2d 1228 (1st Cir. 1991), the First Circuit expressed only a "general desirability and sometime necessity" of notice and a hearing before a court imposes sanctions for bad faith conduct. *Id.* at 1238. "In general, a higher standard of due process protection is required where . . . a sanction is designed to go beyond compensation and punish an attorney"; however, so long as counsel is "given *some* opportunity to justify his actions" the requirements of due process are met. *Id.* at 1238-39 (emphasis in original). The *Media Duplication* court specifically eschewed any *per se* requirement for notice before a court imposes sanctions on an attorney personally for discovery abuse. *See id.* Rather, in the context of sanctions, the amount of process due varies according to the severity of the

sanction and the circumstances of each individual case. *See Media Duplication*, 928 F.2d at 1238; *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 606-07 (1st Cir. 1988). Given this flexible standard, the court has no apprehensions that either attorney's rights were unfairly trammeled.

A thorough review of the transcript reveals that the bankruptcy court accorded all of the individuals involved more than an ample opportunity to relate their versions of events and to justify their actions. Stein testified; Blagg testified; Cannon elected not to.[8] And despite his "not testifying," Cannon freely interjected his recollections of events when factual discrepancies arose. At several point during Stein's testimony, Cannon, even though an advocate, corrected Stein's testimony "for the record" Moreover, as shall be seen, the court's remarks were not unduly severe in light of the conduct involved. All of these facts lead

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[8] Apparently, Cannon did not testify to avoid placing his credibility as a witness in issue in proceedings in which he was an advocate. *See* D.R.O. Loc. R. 4(d) (adopting R.I. Rules of Professional Conduct Rule 3.7(a) ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness. . . .")). Stein, on the other hand, testified and was cross-examined by a member of his firm. *See id.* (adopting R.I. Rules of Professional Conduct Rule 3.7(b) ("A lawyer may act as advocate at a trial in which another lawyer in the lawyer's firm is likely to be a necessary witness. . . .")). In asserting that he was ethically constrained from offering the court his version of events, Cannon misunderstands the meaning and purpose of the, so-called, "advocate-witness" rule.

While this rule is not without great commentary, the general purpose of the rule is to avoid the appearance that, as advocates, lawyers may argue facts they know to be untrue. *See Culebras Enters., Corp. v. Rivera-Rios*, 846 F.2d 94, 99-100 (1st Cir. 1988). It is not to shelter lawyers from their own misdeeds. If Cannon possessed material, first-hand knowledge about what transpired which was necessary to this matter, then he owed *to his client*, to turn the reigns over to his colleague, Thomas Jones, also in attendance, rather than complain afterward that he was denied an opportunity to be heard.

the court to conclude that Cannon and Blagg had a fair hearing within the confines of *Media Duplication*.

Moreover, the court does not find any due process violation resulting from the bankruptcy court's refusal from the bankruptcy court's refusal to consider appellants' post-judgment affidavits. Nor was the court under any obligation to meet with representatives from the Justice Department to better understand the testimony that was heard. Due process does not require that disappointed litigants or their attorneys have a second opportunity to litigate factual issues once a full and fair hearing has been provided. The government and their agents had an opportunity to persuade the bankruptcy court that they acted in good faith during the discovery process. They did not.

The bankruptcy court acknowledged that it made factual errors in its first decision. It corrected those errors on the record facts and noted them in an amended judgment. The court finds no error in the bankruptcy court's application of the standards for reconsideration under Bankruptcy Rule 9023. *See Williams II*, 188 B.R. at 725 (citing *In re Almacs, Inc.*, 181 B.R. 143, 143-44 (Bankr. D.R.I. 1995)).

D. The Sanctions Imposed

Turning now to the sanctions imposed, the court reviews the record below to make sure that the bankruptcy court had the authority to sanction the attorneys as it did and that it did not abuse its discretion in the exercise of its authority.

1. The Monetary Sanction

With respect to the sole monetary sanction remaining, Cannon raises a bevy of procedural and legal issues. The court

need not address all of his arguments in detail because this particular sanction, imposed pursuant to Rule 37(b)(3) for the nonproduction of the partnership audit files, suffers a basic infirmity: The court never issued a specific order compelling the production of the contents of these files.

It is well settled that a court cannot impose sanctions pursuant to Rule 37(b)(2) unless and until a specific order pursuant to Rule 37(a) is issued and then violated. *See R.W. Int'l Corp. v. Welch Foods, Inc.*, 937 F.2d 11, 18 (1st Cir. 1991); *Fleet Nat'l Bank v. Tellier*, 171 B.R. 478, 484 (D.R.I.1994). In this regard, the rules of discovery are mechanical. They set forth a systematic two-step process for the enforcement of their provisions. Like the "ball player" who cannot advance directly "from second base to home plate, without bothering to round, let alone touch, third base," a court may not utilize the more stringent measures described in Rule 37(b)(2) until it has specifically ordered the disclosure of particular discovery pursuant to Rule 37(a) and that command has been disobeyed. *R.W. Int'l,* 937 F.2d at 15. Although the parties led the court below on a fruitless odyssey of what transpired long after the deadline set by the bankruptcy court, to determine whether or not Cannon violated its discovery order, the court really did not need to look beyond the four corners of the order and the subsequent state of affairs on February 29, 1992.

Looking now at the bankruptcy court's order, which merely compelled the documents response to the debtor's April 30, 1991 request, this court finds that there is merit to Cannon's argument that the order did not specifically describe the partnership audit files. This defect is the result of the debtor's inartfully drawn request which did not describe the documents

sought with "reasonable particularity."[9] Fed.R.Civ.P. 34(b). Examining the request, this court does not believe that a reasonable person, earnestly seeking to respond, would have known that the partnership audit files were requested. *See* 7 Moore's Federal Practice, § 34.11[3], 34-29 (3d. ed.1997); 8A Wright, Miller, & Cooper, Federal Practice and Procedure, § 2211, 415 (2d. ed.1994).

Debtor's counsel suggested several ways in which his original request could have been construed to describe the partnership audit files. For example, the debtor argue that the contents of the documents generated in connection with the AMPs settlement negotiations related to the extension of the statute of limitations because if a settlement had been entered into back in 1988, the statute would have run long ago. However, it strains the imagination to expect that a reasonable receipt of the debtor's request would have intuited that construction. To be sure, the far easier course of action would have been either for counsel to include a fifth category of documents in the original request or to serve upon the government a second request for the production of the partnership audit files. No doubt, Stein was aware of these options.

Assuming a good faith attempt to comply with the bankruptcy court's order, the court concludes that reasonable persons, such as Cannon or Blagg, would not have known to send the partnership audit files on or before February 28, 1992. Accordingly, the $750 monetary sanction must be vacated. The court's findings of fact, however, need not be disturbed.

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[9] Stein testified that this document was a boilerplate request generated from his word processor.

2. Public Reprimand

The bankruptcy court's findings, based on conduct irrelevant to the Rule 37 issues, are not factually erroneous and can be sustained on the record before this court. The evidence before the court below indicates behavior which, although not in violation of the discovery rules *per se*, violated the spirit of the rules and wasted much of the court's scarce resources. Fundamentally, what the bankruptcy court heard was substantial evidence that Cannon and Blagg, among others, made promises that they did not keep. In deed, Cannon has prevailed on a technical were not specifically subject to the January 14, 1992 order. The evidence was uncontroverted, however, that he proposed these materials and did not deliver.

The power of courts to state publicly and publish their findings and opinions is a power "necessary to the exercise of all others." *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-66, 100 S.Ct. 2455, 2463-64, 65 L.Ed.2d 488 (1980). Not conferred by a specific rule or statute, this power is inherent in a court's ability to manage its own affairs, discipline the attorneys appearing before it, and explain its reasoning "'so as to achieve the orderly and expeditious disposition of cases.'" *Chambers v. NASCO*, Inc., 501 U.S. at 43, 111 S.Ct. at 2132 (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 631, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962)). When confronted with conduct which is not sanctionable by particular discovery rules, courts have other means of redressing abusive or opprobrious discovery practices. They need not turn a blind eye to promises which are undisputably broken and which detail the proceedings before them for two and one half years. Publishing specific findings of bad faith is but one remedy the bankruptcy court had

available. *See Bank of Nova Scotia v. United States*, 487 U.S. at 263, 108 S.Ct. at 2378, *United States v. Hasting*, 461 U.S. at 506 n. 5, 103 S.Ct. at 1979 N. 5; *Horn*, 29 F.3d at 758 n. 1.

Like all judges, bankruptcy judges sometimes must make difficult determinations as to the credibility of witnesses and the forthrightness of attorneys. Indeed, sometimes such findings operate as a sanction. However, "a primary aspect" of the inherent authority vested in courts is "to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers*, 501 U.S. at 44-45, 111 S.Ct. at 2133. Here, the court has no qualms with the bankruptcy court's findings, whether or not they are viewed as a sanction.

It was uncontroverted that by May, 1992 Cannon and Blagg knew what documents the debtor was seeking. He had filed not one, but two, dispositive motions which set forth what materials he thought he had requested. Both Cannon and Blagg discussed the matter with Stein, and whether or not Blagg liked it, the government had *promised*, as early as June, 1992, that Stein could see any nonprivileged materials contained in the partnership audit files. This promise was reaffirmed by Cannon on several occasions and in correspondence by others in the Justice Department. What the bankruptcy court came to learn, after it indulged the government numerous extensions and continuances to gather the requested materials, was that these government actors did not keep their word. Two and a half years passed with the debtor and the court relaying on the government's representations. In the end, the government offered the bankruptcy court a technical legal explanation that these materials had not been *formally* requested in 1991. Quite understandably, the bankruptcy court was not impressed, nor should it have been.

Whether conduct is in violation of a standing discovery order or in breach of an informal agreement, the evidence before the bankruptcy court fully supports the finding that appellants' conduct was "intentional, unprofessional, and unjustified." As a sanction, the court made known its findings and exposed those persons who it perceived were to blame. See *Jones v. Winnepesaukee Realty*, 990 F.2d 1, 5-6 (1st Cir.1993) (deterring parties and other litigants from abusive behavior displayed is valid use of sanctioning power). Thus court discerns no error either in the choice or the severity of the sanction imposed. The bankruptcy court's findings are left in tact.

E. Remaining Issues

Having vacated the $750 monetary sanction, this court has no cause to consider the arguments of the government appellants that the bankruptcy court exceeded its authority by enjoining appellants Blagg and Cannon from seeking reimbursement from their employer, the United States.

Likewise because the court has concluded that the record facts justify the bankruptcy court's finding of bad faith, there is no need to remand the case for further proceedings in this matter. Appellants' request that the case be reassigned to a different judge for further fact-finding is therefore *denied*.

III. CONCLUSION

The record has been set straight. Attorneys Cannon and Blagg did not, in fact, violate an order of the bankruptcy court to produce certain documents. However, they did not act entirely in good faith. The bankruptcy court's legal conclusion that Cannon and Blagg violated the rules of discovery was

erroneous. However, the court's factual findings that the appellants prolonged already protracted proceedings by making promises which they did not keep are fully supported by the record. The $750 sanction against appellant Cannon is *vacated*. Appellant Blagg's alternative petition for mandamus is *denied*. The appeal of the United States, Janet Reno, and Robert Rubin is *dismissed*. In all other respects, the amended judgment of the bankruptcy court is *affirmed*.

SO ORDERED.

APPENDIX D

In re Lawrence G. WILLIAMS, Debtor.

Lawrence G. WILLIAMS, Plaintiff,

v.

UNITED STATES of America, Internal Revenue Service, et al., Defendants.

Bankruptcy No. 90-12125.
Adv. No. 91-1047.

United States Bankruptcy Court,
D. Rhode Island.

Oct. 24, 1995.

DECISION AND ORDER GRANTING IN PART AND DENYING IN PART THE GOVERNMENT'S MOTION TO VACATE, ALTER, OR AMEND ORDER AND JUDGMENT

ARTHUR N. VOTOLATO, Bankruptcy Judge.

This adversary proceeding was brought by the Debtor, Lawrence Williams, for a determination that he has no federal tax liability. The Internal Revenue Service says he owes $22 Million Dollars. Before us for consideration today is the Motion of "Defendant United States of America, of Charles J. Cannon, Esq., of William Blagg, Esq., and of Janet Reno, Attorney General of the United States, and Robert Rubin,

Secretary of the Treasury of the United States of America,[1] to Vacate, to alter or Amend Order or Judgments, or for a New Trial" regarding our April 14, 1995 decision and Order, *Williams v. United States (In re Williams)*, 181 B.R. 1 (Bankr. D.R.I. 1995). The Movants seek

> an order reconsidering, vacating, altering or amending the order dated April 14, 1995 . . .In the alternative, the movants seek either a new trial or hearing or leave to reopen and to supplement the record with additional evidence, including testimony, on the sanctions issue.

(Motion to Vacate, to Alter, or Amend, at 1.)

For the reasons discussed below, the Motion is GRANTED in part (see pages 8,9,12,13, and 23), and DENIED as to the rest.

DISCUSSION

The Movants take serious issue with an April 14, 1995 Decision and Order (hereinafter "Decision") wherein this Court granted the Plaintiff's Motion for Sanctions under Fed.R.Civ.P.

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[1] Janet Reno and Robert Rubin have joined in the Motion, asserting that "the order of the bankruptcy court effectively infringes upon the discretionary powers of the Attorney General and the Secretary of the Treasury and their respective delegates to manage their respective executive departments, all in violation of the constitutional principle of separation of powers. [Reno and Rubin] further assert that in acting without notice to the United States of America, to the Attorney General, and to the Secretary of the Treasury of its intent to limit their authority and discretion to reimburse and without giving them an opportunity to be heard, the bankruptcy court has deprived the United States of America, the Attorney General and Secretary of the Treasury of their right to the substantive equivalent of due process." (Motion to Vacate, to Alter, or to Amend, at 3.)

37(b), and *inter alia*, ordered the Internal Revenue Service to pay the Plaintiff's reasonable legal fees and expenses incurred in forcing compliance with prior discovery orders. As an additional sanction, based upon findings and conclusions made at the end of a lengthy hearing, Messrs. Blagg and Cannon were ordered "to [each] pay [personally] $750 to the Clerk of the Bankruptcy Court, for deposit into the General Fund." *Williams*, 181 B.R. at 5.

It is the $750 in personal sanctions that has generated a deluge of literary overkill by the Movants that exceeds anything previously seen by this Court. In their effort to obtain a reversal of the personal sanctions, and to extract an apology from the Court for its allegedly wrong call here, the Movants have filed motions, memoranda, affidavits, declarations, and other documents totaling approximately 260 pages, with over 200 footnotes.[2] The Movants could and should have delivered their message in far less time and space. Such voluminous filings are burdensome and unfair to courts and litigants who are required to read, analyze, and respond to them, and to prevent similar future excesses in this and other cases, we have belatedly promulgated Administrative order 082195 which, *inter alia*, sets page limits and footnote type size requirements. Having said that, but also in fact having closely examined *all* of the Movant's papers in these proceedings, we will try to cull out the rhetoric and address the merits of the Government's arguments.

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[2] These filings do not include a recent flurry of letters received by the Court from *both* the Plaintiff and the Movants, which have been returned to the senders, as improper pleadings.

I. *Standards to Alter or Amend Judgment/New Trial*

The grounds for a new trial or amendment of judgment are set forth in Fed.R.Civ.P. 59(a), which is made applicable in bankruptcy by Fed.R.Bankr.P.9023.[3] The scope of review under Rule 9023 extends only to errors of law or fact, and to cases where evidence is newly discovered. *In re Neill,* 158 B.R.93, 97 (Bankr.N.D.Ohio 1993); *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207 (5th Cir. 1986) (analyzing Rule 9023's equivalent under Fed.R.Civ.P. 59 & 52(b)). More to the point in this case, a motion to alter or amend judgment "cannot be considered 'a vehicle for raising issues or citing authorities a party could or should have presented prior to the court's ruling. It is not a vehicle for rehashing arguments previously made or refuting the court's prior ruling.'" *In re Bank of New England Corp.*, 142 B.R. 584, 587 (D.Mass.1992), *quoting, In re Grand Builders, Inc.* 122 B.R. 673, 675-76 (Bankr.W.D.Pa.1990).

Recently, in *In re Almacs, Inc.* 181 B.R. 143 (Bankr.D.R.I.1995), we discussed the standard for reconsideration[4] under the Federal Rules of Bankruptcy Procedure:

> "[T]o succeed on a motion to reconsider, 'the Court requires that the moving party show newly discovered evidence or a

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[3] The rule states in part: "A new trial may be granted to all or any of the parties and on all or part of the issues . . . (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States."

[4] By "reconsideration", we refer to the same standard applicable under Fed.R.Bankr.P. 9023. *See Equity Sec. Holders' Comm. v. Wedgestone Fin. (In re Wedgestone Fin.)*, 152 B.R. 786, 788 (Bankr.D.Mass.1993).

manifest error of fact or law.'" *Champagne v. Equitable Credit Union (In re Champagne)*, 146 B.R. 506, 508 (Bankr.D.R.I. 1992) *(quoting In re Wedgestone Financial*, 142 B.R. 7, 8 (Bankr.D.Mass.1992)); *In re Bank of New England Corp.*, 142 B.R. 584, 587-88 (D.Mass.1992). In *Champagne* we adopted the bankruptcy judge's remarks in *In re Armstrong Store Fixtures Corp.*, 139 B.R. 347, 350 (Bankr.W.D.Pa.1992). . .:

> [i]nitial arguments are not to be treated as a dress rehearsal for a second attempt to prevail on the same matter. Counsel is also expected to 'get it right' the first time and to present all the arguments which counsel believes support its position. Arguments which counsel did not present the first time or which counsel elects to hold in abeyance until the next time will not be considered.

139 B.R. at 350; *see also Champagne*, 146 B.R. at 508.

In re Almacs, 181 B.R. at 143-44. With these principles in mind, we will address the specifics of the motion now under consideration.

II. *Reconsideration of Findings of Fact*

To begin with, there is no newly discovered evidence, and this leads us straight to the Cannon and Blagg Declarations (Docket Nos. 47 & 48), and much of the writing submitted on their behalf by Peter Sklarew, Esq. which contain mostly self-serving pronouncements of the allegedly righteous manner in which IRS attorneys relate to opposing counsel—none of which is in the record, however. The Movants have also described at length the private thought processes of Government lawyers, to

show why they conducted their part of the January 1995 rule 37(b) hearing as they did.

Mr. Blagg, for example, explains that he was "very uncomfortable" on cross examination and that this caused him "to limit some of . . . [his] answers." He also says "having thoroughly reviewed the files since the Decision, my recollection has been refreshed in several areas in which I was not able to recall events fully at the hearing." These are meritless afterthoughts, at best. So is Mr. Cannon's lament that "[h]ad I the slightest idea that the Court was considering sanctions against me personally, I would have taken the witness stand and offered many of the following facts at the hearing . . ." He then goes on for more than twenty pages describing the high points of his legal career, to demonstrate that he could not have conducted himself as this Court found him to have behaved in this litigation. These after-the-fact reminiscences are not deserving of a time-consuming response, and we simply refer the Movants to Rule 37(b).[5]

The Government is also reminded of its own stipulation in the Proposed Joint Pretrial Order, that one of the issues of law to be determined was "[w]hether the appropriate sanction to be imposed against the Government, under the circumstance, should be the striking of the Government's pleadings and the entry of judgment in favor of the plaintiff and against the Government, *or some other sanction pursuant to Rule 37(b) of the Federal Rules of Civil Procedure and Rule 703(b) of the Bankruptcy Rules.*" Proposed Joint Pre-Trial Order Submitted

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[5] The Rule states in part: ". . . the court *shall* require the party failing to obey the order *or the attorney advising that party or both* to pay the reasonable expenses, including attorney's fees, caused by the failure . . ." Fed.R.Civ.P. 37(b) (emphasis added). Under either the law or the facts, there is no room for claimed surprise by the Movants.

By the Government, at 12. (emphasis added). Mr. Cannon made an informed, tactical decision not to testify, *after being specifically queried by the Court as to his intentions,* immediately upon his arrival at the hearing on January 23, 1995. (See Transcript, Jan. 23, 1995, at 23-24.) The reams of information now proffered by the Movants were all available at the time of the hearing which lasted three days and where both sides were given wide latitude to fully develop and present their positions. Based on the record and the applicable law, the Declarations of Charles Cannon and William Blagg, as well as those portions of Mr. Sklarew's arguments not based on the record are rejected and stricken, as impermissible second bites at the apple.

Several arguments by the Movants do have merit, however, and as to those we agree that corrections and amendments are in order, i.e., the Decision under scrutiny states: "On January 7, 1992, after even further hearing, we overruled its objection and ordered the IRS to produce *all requested documents* within 45 days. (*See* Joint Exhibit 1, January 14, 1992 Order.) Again, IRS did nothing . . . ." *Williams,* 181 B.R. at 3. The Movants correctly pointed out that the IRS *did* produce *some* documents, on February 28, 1992. We acknowledge the misstatement, apologize, and strike from the Decision the words "[a]gain, IRS did nothing."[6]

We also retract and delete footnote 4 which states "[i]t is as though the IRS new heard of response/objection deadlines, the Federal Rules of Civil Procedure, or the Rules of Bankruptcy Procedure." *Williams* 181 B.R. at 3 n. 4. By this redaction we acknowledge that the IRS has, on occasion, filed

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[6] As to this and all other redactions herein, an appropriate errata will be distributed for publication, simultaneous with the filing of this Decision.

timely responses (*see, e.g.*, Objection to Motion to Compel, Docket § 10; Objection to Motion to Preclude, Docket #19; Objection to Motion for Summary Judgment, Docket #15). Notwithstanding said deletions, however, the bottom line is that by its own admission the IRS has not, to this day, fully complied with a discovery order that is nearly four years old. (*See* Revised Reply Brief on Behalf of Blagg & Cannon, Docket #79, at 1-2; U.S. Disclosure Respecting Non-Responsive Document, Docket #96.[7]) In fact, the Government concedes in its Proposed Joint Pre-trial Order (docket #29) that:

> [o]n or about February 28, 1992, the Government produced only certain documents responsive to the requests, failing to produce all consents executed by the Plaintiff, or of the certain partnerships of which plaintiff was a limited partner, of the statute of limitations for the tax years at issue, or the documents concerning the audits of said partnerships to support the Notices of Deficiency with respect to the partnership items listed by the plaintiff on his income tax returns.

(Proposed Joint Pre-Trial Order Submitted By the Government, at 3.)

The Government also contends that the Court failed to consider the relevancy of the requested documents, and that non-production should have been excused on that ground. In discovery it is the objector who has the (considerable) burden on issues of relevancy. *See Flag Fables, Inc. v. Jean Ann's Country Flags & Crafts*, 730 F.Supp. 1165, 1186

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[7] While the government considers the produced document to be "non-responsive," that is highly self-serving and unquestionably disputed.

(D.Mass.1989). In the first place, this argument comes much too late, and although the subject was referenced briefly in its papers, the Government did not argue relevance during the sanctions hearing, but instead focused its attention on other issues, principally whether the Debtor had accepted the IRS's arbitrage settlement offer. For our purposes that very tenuous objection was waived, but even if pressed, it would almost certainly have had to be rejected.[8] Also regarding waiver, on numerous occasions Mr. Cannon volunteered, without limitation or qualification, that he would produce *all* requested items. *See Williams*, 181 B.R. at 5. What has really happened, after all of the arguments, is that the Defendant, with no acceptable reason, failed to produce documents as ordered or as promised, allowed their rights to expire on the issue, and now feeling very unhappy with the consequences, would like to go back to the beginning, and start again. That option is not available to the Defendant at this time.

III. *Reconsideration of Conclusions of Law*

In addition to their dissatisfaction with this Court's fact finding abilities, the Movants argue that Bankruptcy Courts lack the authority to impose personal sanctions against government attorneys. They also claim that their Fifth Amendment due process rights were violated, because they were not given sufficient notice and opportunity to present an adequate defense. We address these arguments as follows:

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[8] "Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action . . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1); *see also Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) (relevancy in discovery should be broadly and liberally construed).

A. *Personal Jurisdiction Over William Blagg, Esq.*

Mr. Blagg and the Government argue that Blagg was "merely a gatherer and custodian of the IRS's records which the Justice Department had agreed to produce to the plaintiff," and that therefore, as to him there is no *in personam* jurisdiction. (Cannon and Blagg Brief in Support of 9023 Motion, at 33.) We are skeptical of the genuineness of the Movants' present position,[9] but because Mr. Blagg in fact did not file a formal entry of appearance, we will err on the side of conservatism and accept the contention that he is not subject to this Court's Rule 37 sanctioning powers. Accordingly, the $750 sanction imposed against William Blagg, Esq., is VACATED. Notwithstanding this ruling on a very close call,[10] the findings and conclusions regarding Mr. Blagg's conduct and demeanor remain intact.

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[9] At the commencement of the sanctions hearing, and before the testimony of any other witnesses, the Plaintiff asked to have Mr. Blagg sequestered. The Government objected strenuously, arguing that Blagg's presence in the courtroom was essential to protect the Government's interest. We accepted that representation, denied the motion to sequester, and allowed Mr. Blagg to remain in the courtroom, *seated with other Government counsel, at counsel table*, for the entire hearing.

Frankly, it never occurred to this Court to inquire as to whether Mr. Blagg had filed an entry of appearance. In the future, however, we will be more careful regarding the requirement of formal appearances by such "custodian/information gatherers," who also are lawyers.

[10] Mr. Blagg certainly walked and talked like a lawyer in this litigation, and his demonstrated assertiveness as described in the April 14, 1995 Order belies the low profile "civilian" role that he now projects. *See Williams*, 181 B.R. at 3-4

B. *Jurisdiction to Sanction for Contempt*

The Government also disputes the authority of an Article I Bankruptcy Court to impose sanctions for contempt at all. That issue was put to rest in this Circuit when the Court of Appeals stated "[i]t is well-settled law that bankruptcy courts are vested with contempt power." *In re Power Recovery Sys., Inc.*, 950 F.2d 798, 802 (1st Cir. 1991). The Congressional intent in enacting § 105 of the Bankruptcy Code was to enable the Bankruptcy Court to enforce its own judgments, and there is nothing unconstitutional about the exercise of contempt power by a bankruptcy court. *Kellogg v. Chester*, 71 B.R. 36, 38-39 (N.D.Tex.1987); *In re Haddad*, 68 B.R. 944 (Bankr.D. Mass.1987); *see also Fernos-Lopez v. United States Dist. Court*, 599 F.2d 1087, 1090-91 (1st Cir.), *cert. denied*, 444 U.S. 931, 100 S.Ct. 275, 62 L.Ed.2d 189 (1979); *In re Newport Offshore, Ltd*, 88 B.R. 566, 571 (Bankr D.R.I.1988.

C. *Due Process*

Although there is no *per se* requirement, notice and opportunity to be heard are, of course, desirable when monetary sanctions are imposed, see *Media Duplication Servs., Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1238 (1st Cir. 1991), and while a full hearing is not required for every sanction imposed by a court, the sanction must comport with procedural due process requirements. *Id.*

This is the gist of Mr. Cannon's due process argument:

> [t]he first time monetary sanctions (against the government) and/or decision on the merits were ever mentioned was by the Court at the conclusion of Mr. Riso's oral argument, 2/25/95 Tr. At 218-19, and that mention was not in the

> form of any indication that such sanctions were deemed appropriate. The first time plaintiff moved for either default judgment or recoupment expenses was in his post trial brief.

(Brief on Behalf of William J. Blagg and Charles J. Cannon in Support of Rule 9023 Motion, at 15.) The Government's complaints about insufficient notice and lack of due process are borderline frivolous (and therefore sanctionable), in that Mr. Cannon (1) was the attorney of record for the IRS in this proceeding; (2) he prepared, signed and filed a proposed joint pre-trial order at the commencement of the hearing on January 20, 1995, indicating at page 12 that an issue of law to be considered by the Court was "some other sanction pursuant to Rule 37(b) of the Federal Rules of Civil Procedure"; and (3) Rule 37(b) specifically provides for monetary sanctions against the noncomplying party and/or its attorney. *See Roadway Express Inc. v. Piper*, 447 U.S. 752, 763, 100 S.Ct. 2455,2462-63, 65 L.Ed.2d 488 (1980). As to Mr. Cannon, all notice requirements have clearly been satisfied, the request for relief on due process grounds is without merit, and it is DENIED.

The Movants also contend that prior to imposing sanctions against an attorney under Rule 37(b), there must be a finding of bad faith or contumacious behavior. Those elements in fact are present here, but we disagree that the proffered standard is correct. A finding of willful, contumacious or otherwise extreme behavior should precede a *dismissal* of the obstructionist party's claim under Rule 37, but is not as necessary to assess monetary sanctions. See, *e.g.*, *Velazquez-Rivera v. Sea-Land Serv., Inc.*, 920 F.2d 1072 (1st Cir. 1990) (the plaintiff's discovery violations were not deemed severe enough to warrant dismissal of the claim, although the

monetary sanction against counsel was affirmed).[11] Sanctions under Rule 37(b) are appropriate once it is established that a party has failed to comply with a valid discovery order. *See Roadway Express*, 447 U.S. at 763, 100 S.Ct. at 2462-63; *E.E.O.C. v. Sears, Roebuck & Co.*, 114 F.R.D. 615, 626 (N.D.Ill.1987); *see also Tamari v. Bache & Co.* (Lebanon) *S.A.L.*, 729 F.2d 469, 473 (7th Cir. 1984). When contemplating sanctions under Rule 37(b), a court should consider: 1) the facts of the case; and 2) the Court's *purpose* in imposing the penalty. *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 394 (1st Cir.), *cert. denied*, 498 U.S. 891, 111 S.Ct. 233, 112 L.2d.2d 193 (1990).

The Court in *Anderson* held that sanctions under Rule 37 may serve the dual purposes of deterrence and compensation. 900 F.2d at 394. "Whether deterrence or compensation is the goal, the punishment should be reasonably suited to the crime. Nevertheless, whichever purpose is to be served—and often, sanctions are designed to serve some combination of the two prime purposes—the trial court's discretion in fashioning sanctions is broad." *Id.* at 395; *see also National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780-81, 49 L.Ed.2d 747 (1976). Also, the degree of culpability is a factor to be considered in determining

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[11] This test was applied most conservatively, we think, in this instance, where token money sanctions were imposted for attorney misconduct instead of judgment against the IRS on the merits of a 22 Million Dollar tax claim, as demanded by the taxpayer Plaintiff. The ironic thing about this entirely overdone (reconsideration proceeding is that the Government which has gone to such unprecedented lengths to unto this Court's discovery orders, has been treated with extreme deference on the merits of this very substantial litigation. at some point, one would expect the Government to recognize this.

the severity of the sanction to be applied, *see Sears, Roebuck & Co.*, 114 F.R.D. at 626-27, and acts of culpability may include willful disobedience, gross indifference to an adverse party, or deliberate carelessness. *See Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Cir. 1970.)

In determining the appropriate amount of a monetary discovery sanction, the award does not have to relate precisely to the cost or expense of the added litigation arising from the discovery abuse. *See, e.g. United States v. Sumitomo Marine & Fire Ins. Co.* 617 F.2d 1365 (9th Cir. 1980). In *Sumitomo,* the District Court was not presented with the exact amount of expenses incurred by the defendant when it sanctioned the government attorney, personally, $500. *Id.* at 1370-71. The Court of Appeals upheld the award, explaining that an exact accounting of the defendant's damages was not needed and that the $500 sanction was "a measured response to the flagrant disobedience of court orders by government counsel." *Id.* at 1371. Notwithstanding the Government's extreme disagreement with the result here, we se little distinction between our facts and *those* in *Sumitomo*.

The Government also insists that the Decision be republished, without using the names of the two sanctioned attorneys. This entire proceeding was conducted on the record, nothing was disclosed to the Court in confidence, and the findings and conclusions as stated in the Decision fairly reflect what happened. The Decision, particularly as it has been amended and redacted, contains our findings of fact *as determined from the record*, which in the judgment of this Court does not call for or *justify anonymity*. *See United States v. Horn*, 29 F.3d 754, 758 n. 1 (1st Cir. 1994). Accordingly, the request that the decision be republished without using the names of Government lawyers, is DENIED.

D. *Authority to Sanction Government Lawyers Personally*

The Movants also insist that Government attorneys may not be sanctioned personally, because they are protected by the doctrine of sovereign immunity. We do not seem to be alone in our disagreement with this agreement, either. "[B]ankruptcy courts have authority to exercise both civil and criminal contempt powers against recalcitrant government attorneys." *In re Graham*, 981 F .2d 1135, 1142 (10th Cir. 1992). Government lawyers can be personally sanctioned pursuant to Fed.R.Civ.P.37(b). *See, e.g., Sumitomo*, 617 F.2d 1365; *see also E.E.O.C. v. Waterfront Comm'n*, 665 F.Supp. 197, 201 (S.D.N.Y.1987) (". . . government attorneys [are] on notice that they are not exempt from the federal rules and that they will be held to the highest standards of the Bar"); *United States v. Shaffer Equipment Co.*, 158 F.R.D. 80, 87 (S.D.W.Va.1994) ("[s]overeign immunity is not a bar to personal sanctions on government attorneys . . . because these sanctions do not come from the public coffers").[12] In *Sumitomo* discussed *supra*, the sanctioned government attorney raised the defense of sovereign immunity. The Court of Appeals upheld the sanction on the ground that under (former) Rule 37(f), the government was immune from the assessment of attorney fees and expenses and therefore, "the district court's only available target for such sanctions was the

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[12] Similarly, the Government's assertion of sovereign immunity here is misplace, as the sanction in question was awarded against counsel *personally*—not against the United States. *See Sumitomo*, 617 F.2d at 1370-71. Even if the Government was the target of the sanction, however, sovereign immunity would not be a defense in this instance. The Bankruptcy Reform Act of 1994 substantially redefined and limited sovereign immunity as to at least sixty specific Code sections, and even imposed the amendment retroactively. *See* Bankruptcy Reform Act of 1994, Pub.L. No. 103-394, § 702(b)(2)(B), 108 Stat. 4106; 11 U.S.C. § 106(a)(3).

government's counsel." 617 F.2d at 1371; *see also Horn*, 29 F.3d at 766 (quoting *Sumitomo* with approval).

The Fifth Circuit adopted a similar position, vis-a-vis the repeal of former Rule 37(f). "By taking away the government's protection from Rule 37 sanctions, Congress could not have been clearer in revealing its intent to subject the government and its attorneys to Rule 37(b)(2)(E). . ." *Chilcutt v. United States*, 4 F.3d 1313, 1326 (5th Cir. 1993) (emphasis added), *cert. denied, Means v. Wortham*, – U.S. –, 115 S.Ct. 460, 130 L.Ed.2d 367 (1994). The court in *Chilcutt* also made clear that the government attorneys are to be treated in the same manner as private attorneys. *Id.* at 1325.

Although we are aware of no published case in the First Circuit where monetary sanctions were levied against a government lawyer in a civil case, we believe that our Court of Appeals would rule similarly if presented with the issue. *In United States v. Horn*, 29 F.3d 754, a criminal case, the First Circuit Court of Appeals explicitly detailed a number of acceptable methods of redress for government attorney misconduct, including monetary sanctions. In that case the District Court assessed costs and attorney fee *against the United States* because of prosecutorial misconduct. The Court of Appeals reversed, on sovereign immunity grounds but went on to say that:

> Courts have many other weapons in their armamentarium. This case aptly illustrates the point. The district judge ordered, among other things, the removal and quarantine of the lead prosecutor, the suppression of tainted documents, and the advance disclosure of the government's trial strategy. In addition, the judge could have ordered the lead prosecutor to pay the accumulated fees, *see Chilcutt*, 4

> F.3d at 1319 (upholding order that government counsel pay, *inter alia*, for the time spent by defense counsel at contempt hearing, without being reimbursed); *United States v. Sumitomo Marine & Fire Ins, Co.*, 617 F.2d 1365, 1370-71 (9th Cir. 1980) (upholding imposition of monetary sanctions for discovery abuse against government attorney as the "only available target for such sanctions"), but did not see fit to do so. He also could have ordered the prosecutor to attend ethics seminars at her own expense, *see Chilcutt*, 4 F.3d at 1319, dispatched her to the Justice Department's internal disciplinary office, *see [U.S. v.] Hasting*, 461 U.S. at [499] 506 n. 5, 103 S.Ct. at [1974] 1979 n. 5, [76 L.Ed.2d 96] (1983), or publicly reprimand the Justice Department itself, *see United States v. Prince*, 1994 WL 99231 at *1-2, 1994 U.S.Dist. LEXIS 2962 at *1-*4 (E.D.N.Y. 1994).

Id. at 766-67. That *Horn* is a criminal case does not lessen its value as precedent in the instant dispute.

The Reno-Rubin separation of powers argument contains no discernible merit, and is rejected. In so holding, we again agree with the Fifth Circuit Court of Appeals, in *Chilcutt*, that if separation of powers bars the judiciary from sanctioning government attorneys personally,

> [s]uch a decision would invite members of our sister branches to ignore acceptable standards of decorum in courts and flout court orders. Indeed, to rule [in such a manner] . . . would rob federal courts of power they inherited at their inception: power to preserve order in judicial proceedings and enforce judgments.

4 F.3d at 1327 (footnote omitted); *see also Horn*, 29 F.3d at 766-67 (neither sovereign immunity nor separation of powers is a bar to personally sanctioning a government attorney). We also conclude that the authority to personally sanction Government attorneys, implicitly and of necessity, carries with it the authority to prevent the reimbursement of sanctioned Government attorneys. If the rule were otherwise, the authority to sanction them in the first place would be meaningless, and we clearly are not prepared to accept the argument that the Government is the entity best suited to discipline its lawyers for their misconduct.

Under Rule 37(b), we conclude that the imposition of civil sanctions against Charles Cannon, Esq., *personally*, in the amount of $750 was proper and easily within the scope of this Court's discretion, given the record in this adversary proceeding. On the other hand, the Government again is correct, and we accept its argument that the part of the order requiring Mr. Cannon *to pay the sanction into the General Fund*, is improper. Accordingly, the April 14, 1995 Decision is further modified to require that the sanction in question be paid to the Plaintiff, as partial reimbursement of his costs and attorney's fees incurred in obtaining compliance with the January 14, 1992 Discovery Order.[13]

The argument that $750 is excessive deserves no comment, other than–it is rejected.

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[13] The Plaintiff has submitted his request for attorney fees and costs, in the amount of $98,000, incurred in obtaining compliance with the Discovery Order. The reasonableness of that request is disputed, and is being dealt with separately. The above amendment directing Mr. Cannon to pay the sanction directly to the Plaintiff, rather than into the General Fund, will merely reduce the IRS's ultimate liability to the Plaintiff by $750.

Based upon all of the foregoing, the Motion to Vacate or to Alter or Amend the Judgment is GRANTED in part, as indicated at pages 8,9,12,13, and 23, and the rest of the April 14, 1995 Decision and Order remains unchanged. The agreement of the Attorney General and Secretary of the Treasury, on constitutional separation of powers grounds is REJECTED, and the Movants' request for a "new trial" is DENIED.

Enter Judgment consistent with this opinion.

APPENDIX E

In re Lawrence G. WILLIAMS, Debtor.

Lawrence G. WILLIAMS, Plaintiff,

v.

UNITED STATES of America, Internal Revenue Service, et al., Defendants.

Bankruptcy No. 90-12125.
Adv. No. 91-1047.

United States Bankruptcy Court,
D. Rhode Island.

April 14, 1995.

DECISION AND ORDER CONVERTING CASE TO CHAPTER 7, AND GRANTING PARTIAL RELIEF ON DEBTOR'S REQUEST FOR SANCTIONS AGAINST THE INTERNAL REVENUE SERVICE

ARTHUR N. VOTOLATO, Bankruptcy Judge.

Heard on January 20, 23, and 25, 1995, on:

(1) the United States Trustee's Motion to Convert the case to one under Chapter 7; and

(2) the Debtor/Plaintiff's motion against the IRS for default judgment on the merits, or the preclusion, and for

monetary sanctions pursuant to Fed.R.Civ.P. 37(b), based on the Defendant's alleged failure and/or refusal to comply with discovery orders. And required by far the consideration, because it has attracted so much of the parties' attention, we will first address the Plaintiff's Rule 37 motion.[1]

I. *SANCTIONS*

Rule 37(b) allows the Court to sanction a party who has not complied with discovery orders in a pending action. Made applicable in adversary proceedings by Fed.R.Bankr.P. 7037, the Rule states in pertinent part:

(b) Failure to comply with Order.

. . . . .

(2) Sanctions by Court in Which Action is Pending. If a Party . . . fails to obey an order to provide or permit discovery, . . cluding an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . . . .

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

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[1] This opinion sets forth our findings of fact and conclusions of law in accordance with Fed.R.Bankr.P 7052.

. . . . .

In lieu of any of the foregoing orders or in addition thereof, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Fed.R.Civ.P. 37(b). Because of the Government's alleged failure and/or refusal to provide documents as ordered, coupled with the autocratic and unprofessional conduct of its agents throughout the discovery process, the Plaintiff would like a default judgment on the merits of his complaint against the IRS, or alternatively an order precluding, at trial, the introduction of certain evidence and monetary sanctions. The United States denies the allegations, asserting that it has attempted "in good faith to comply with all discovery orders," and that "there is no evidence of any willful conduct or misconduct on behalf of the United States."

The IRS also notes that the Plaintiff has only recently advanced a new theory in its case, since the filing of the January 11, 1995 Tax Court decision, *Manko v. Commissioner*, 69 T.C.M. (CCH) 1636, 1995 WL 39228 (1995), and that it should not be sanctioned for failing to produce documents based on arguments not previously asserted. As to this last point, we are in full agreement, and assure the Defendant, the United States, that any effect the *Manko* decision may have on this proceeding will be no part of our consideration herein. Finally, the IRS argues (incorrectly) that it was the Plaintiff

who failed to comply[2] with Fed.R.Civ.P. 26(a), which requires the production of information without a formal request. By Temporary Procedural Order dated February 8, 1994, this Court opted *not* to apply the 1993 amendments to Fed.R.Civ.P. 26 to adversary proceedings, and therefore those informal disclosure requirements are inapplicable.

In any event, based upon our consideration of the entire record, including the demeanor and credibility of the witnesses, the memoranda submitted, and the arguments of counsel, we find that throughout the long pendency of this adversary proceeding the Defendant has repeatedly and deliberately violated Rule 37(b). We also find and conclude that the IRS's failure to comply with outstanding discovery orders was not substantially justified, that there are no other circumstances that would make an award of expenses unjust, and that sanctions are definitely in order. The only real issue is the amount and/or kind of sanctions that are appropriate, on the facts before us.

Because this matter has been so vigorously contested and extensively litigated, our decision to impose sanctions calls for some elaboration. We begin with a brief chronology of the relevant events. On December 3, 1990, Lawrence Williams filed a Chapter 11 petition, and on February 21, 1991, he brought the instant adversary proceeding against the Internal Revenue Service, seeking a determination of his federal tax liability for the years 1978 through 1988, and 1990. On September 9, 1991, the IRS filed a proof of claim in excess of

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[2] Regarding the defendant's finger pointing, apparently intended to deflect attention away from its own misbehavior, the Court is quite familiar with the Plaintiff's shortcomings, which are dealt with as they are presented, *see Citibank, N.A. v. Williams (In re Williams),* 159 B.R. 648 (Bankr.D.R.I.1993), and our ruling herein on conversion, *infra* at 5-6.

$6.5 million dollars for the tax years in question, challenging certain deductions taken by Williams in his various partnership and limited partnership interests. Williams argues that he owes substantially less than what is asserted in the IRS proof of claim, and also contends that he has *no* liability for several of the tax years in question, on the ground that the statute of limitations prohibits the collection of such taxes.

On April 30, 1991, Williams served his first request for production of documents, with a compliance deadline of May 31, 1991. The IRS did not respond, and on June 10, 1991, Williams filed a Motion to Compel Production. At this juncture, having defaulted, the IRS technically lacked standing to object to either the scope or the content of the Plaintiff's requests. *See* Fed.R.Bankr.P. 7034. Nevertheless, on June 8, 1991, the IRS filed a somewhat puzzling response to the motion, characterizing the [already granted] requests as "burdensome," but also stating that it "would produce documents relating to Lawrence Williams if they were in its possession." And then, on June 25, 1991, the IRS filed an Objection to the Motion to Compel, on the even more curious ground that it had "filed its response to the request for production on June 18, 1991." On July 18, 1991, notwithstanding that its rights on the issue has expired, and for reasons that now escape us, a hearing was held on the Motion to Compel, we heard the IRS's excuses, and granted additional time to provide the overdue documents. Nothing happened. On January 7, 1992, after even further hearing,[3] we overruled its objections and ordered the IRS to produce *all requested documents* within 45 days. (*See* Joint Exhibit 1, January 14, 1992 Order). Again, IRS did nothing, and on May 22, 1992,

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[3] By this time it is clear that the Court itself is guilty of overindulging this Defendant.

Williams filed the instant motion for default judgment, preclusion, and monetary sanctions.

The Plaintiff's May 22, 1992, pleading apparently did attract the Government's attention, and nine weeks later,[4] on July 30, 1992, D. Patrick Mullarkey, Esq., of the Department of Justice wrote to Plaintiff's counsel directing him to Charles J. Cannon, Esq., the IRS's designated trial attorney in this proceeding, for permission to view "ten linear feet" of documents on file at the IRS North Atlantic Region Office in New York City. (*See* IRS Exhibit 65). Stein contacted Cannon, as he was advised to do, and was told by Cannon to call William Blagg, Esq., of the Manhattan IRS District Office, to arrange to examine the files in question. Stein testified that he made repeated attempts to contact Blagg, and logged more than 100 telephone calls over the ensuing months, just to make an appointment to get to see the documents in question. Blagg did not contradict this description of events, and conceded that his relationship with Stein was unfriendly, at best.[5] Finally, nearly four months after Mr. Mullarkey's letter, Blagg agreed to permit the document examination on November 20, 1992, in Manhattan. Stein testified that when he arrived at the IRS on that date, Blagg, produced an obviously incomplete amount of material for inspection, and that only after considerable arguing and a call to Charles Cannon was Stein allowed access to "an additional six linear feet of documents." Stein testified that there were no documents relating to the Arbitrage

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[4] It is as though the IRS never heard of response/objection deadlines, the Federal Rules of Civil Procedure, or the Rules of Bankruptcy Procedure.

[5] The two attorneys were adversaries and learned to dislike each other in earlier Tax Court litigation wherein Stein represented an Arbitrage promoter, and Blagg represented the IRS.

Management Project[6] in the materials produced for inspection, and that Blagg represented to him that there were no such documents. At the end of the day, Stein handed Blagg a small packet of material to be copied and mailed to him. He also left with Blagg a separate list of the documents still due under his initial 1991 discovery request. (*See* IRS Exhibit 68). Ten days to two weeks is the most it should have taken to supply all of this material. In classic bureaucratic style, however, it took Blagg over three months to copy and mail the documents. (*See* Testimony of Dennis Stein and Joint Exhibit 57). Mr. Blagg explained that there was only one secretary for three attorneys in his office, and that *she* just could not attend to this particular task any sooner. In those circumstances, *if true*, Mr. Blagg should have either rolled up his sleeves and made the copies himself, or delegated the job to somebody else. We find Mr. Blagg's conduct to be intentional, unprofessional, and unjustified, and his shifting the blame to his secretary is pure baloney.

Blagg's attitude problem surfaces again on January 13, 1993, in his letter to Mr. Cannon regarding the material requested by Stein at the November 20, 1992 meeting. (*See* IRS Exhibit 69). In that letter Mr. Blagg reports on the status

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[6] The Arbitrage Management Project was established by the Tax Court in an effort to resolve the disputes of over 5,000 taxpayer litigants. As owners of limited partnership interests, the taxpayers had claimed large losses resulting from their involvement in the Arbitrage Partnerships. The IRS questioned the partnership losses, which, in turn affected deductions taken by the taxpayers on their individual tax returns. To avoid what would have been very complex and time consuming litigation, the IRS made an offer of settlement which was accepted by virtually all of the arbitrage taxpayer litigants. A major issue in the proceeding at bench is whether Lawrence Williams accepted the offer, and if so, when. The date of the alleged settlement is important because of statute of limitations questions sought to be raised by Williams.

of the search, makes his determination that the Arbitrage Partnership documents are irrelevant to the instant litigation, and advises that in any event it may take him an *additional 120 days* to locate those documents which he deemed discoverable. This Court has irreconcilable difficulty with: (1) Mr. Blagg's unilateral extension of Court imposed deadlines; (2) his decision not to produce documents, based on his personal determination that they are irrelevant; and (3) his most generous (120 day!) extension to produce documents that he considered to be discoverable. If Charles Cannon, the attorney of record in this proceeding, felt (even though out of time) that certain requests were not proper, then it was his obligation to file a request for protective order, and a judicial determination on the issue. None of this was done. Instead, as we have seen, Cannon referred Stein to Blagg, who did his best to continue to obstruct the Plaintiff's discovery.[7]

The final straw was a letter dated January 21, 1994, from Blagg to Cannon with exhibits attached, but which were not produced until one year later, after this hearing had already begun. In the letter, Mr. Blagg states:

> As requested, we are enclosing copies of documents referred to in connection with a motion to preclude filed by the debtor in the above captioned case. The documents relate to the negotiation of the settlement for cases in the "Arbitrage Management" litigation project and are part of

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[7] The most charitable (although still unacceptable) light in which to view Mr. Blagg's actions was his concern that information given to Stein in this proceeding might be used in cases pending before the Tax Court, where discovery, we are told, is much more limited than in the Bankruptcy Court. That concern should have been raised here but the Defendant chose, instead, to simply ignore this Court's outstanding and overdue discovery orders.

> the record in certain Tax Court cases involving Arbitrage promoters.

(IRS Exhibit 75). Stein testified that although he had not previously seen Blagg's letter, the documents were responsive to the request he made of Blagg in November 1992. He also testified that this was the same material used by the IRS in the *Manko* case, at the same time the existence of these documents was being denied by the IRS in this proceeding. (*See* Joint Exhibit 54). The evidence in *Manko* was concluded on January 18, 1994, three days before Blagg's letter to Cannon. We have heard no acceptable reason[8] why these documents were not produced pursuant to Stein's April 30, 1991 Request for Production, or our Order compelling production prior to January 23, 1995.

Throughout this litigation, the evidence of the Defendant's willfulness is as plain as it can be, and "[t]he day has long since passed when we can indulge lawyers the luxury of conducting lawsuits in a manner and at a pace that best suits their convenience. The processing of cases must proceed expeditiously if trials are to be held at all." *Damiani v. Rhode Island Hospital,* 704 F.2d 12, 16 (1st Cir.1983); *see also DeConcilis v. Crawley (In re Deconcilis),* 119 B.R. 880 (Bankr.D.R.I.1990).

The Internal Revenue Service is not excepted from any of the requirements or standards that are applicable herein. In addition, we find that its actions were specifically calculated to impede Plaintiff's attempts to obtain discovery material to

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[8] That "he [Charles Cannon] did not realize that he had these documents" until January 19, 1995, is clearly not acceptable. *See* Debtor's Exhibit 70; Transcript January 23, 1995, at 66-72.

which it was clearly entitled. Mr. Cannon's repeated assurances that he "would provide the Plaintiff with whatever information he received," are meaningless, and Exhibit 75 is a good illustration of his disdain for the Federal and Bankruptcy Rules of Procedure, his adversaries, and Courts alike. That Attorney Cannon waited over one year to forward to the Plaintiff documents that were continuously in his possession, places his performance and credibility at about the same level as that of his colleague, William Blagg, even though his manner may not be as abrasive.

For the foregoing reasons, the Plaintiff's Motion for Sanctions is GRANTED, but the Motion to preclude is DENIED, WITHOUT PREJUDICE, as the Plaintiff's Request for Default Judgment on the merits.[9] *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43, 96 S.Ct. 2778, 2789, 49 L.Ed.2d 747 (1976). Accordingly, the IRS is ordered to pay the Plaintiff his reasonable attorney fees and expenses incurred in forcing compliance with this Court's discovery orders. Mr. Stein has thirty days to submit his bill and supporting time records to the IRS for payment. As guidance to out of town counsel regarding fee application standards in this jurisdiction, *see In re Almacs, Inc.*, 178 B.R. 598 (Bankr. D.R.I.1995). If the parties are unable to agree on the amount of reasonable compensation and/or expenses, the Court will intervene.

In addition, to discourage these and other government agents from engaging in "big brother" abuses of private sector

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[9] Notwithstanding the egregious conduct of the Defendant's agents, we are reluctant to enter an order that would automatically have such a substantial impact on the United States Treasury, solely because of government lawyer misbehavior. Rather, it this Court's intention to have the Plaintiff's tax liability decided on the merits if at all possible.

litigants similar to those described above, (*see Hill v. United States (In re Hill)*, 71 B.R. 517 (Bankr.D.Colo.1987)), Messrs. Blagg and Cannon are each ordered to pay $750 to the Clerk of the Bankruptcy Court, for deposit into the General Fund. These additional sanctions are directed personally against the attorneys, and are not to be just passed on to the American taxpayers. Therefore, Mr. Blagg and Mr. Cannon are ORDERED to pay said sanctions from their own funds, and they are directed *not* to apply to their employer for reimbursement.

The Defendant is also ORDERED to deliver to the Plaintiff, forthwith, all documents still due under the Plaintiff's first Request for Production, and should include all memoranda of telephone conversations which Mr. Blagg has confirmed are in the IRS files, as well as all internal memoranda similar to IRS Exhibit 73. Finally, documents allegedly protected by the attorney-client privilege, work product, etc., should be delivered to the Court for *in camera* inspection, with the Government's request and reasons for relief regarding any claimed privilege, i.e., we are *not* leaving the determination of privilege with the IRS.

In light of the recent *Manko* decision, discovery is reopened for both parties for an additional sixty days. The Joint Pretrial Order is due on July 31, 1995, and trial on the merits is scheduled for August 14, 1995.

II. *THE MOTION TO CONVERT*

The United States Trustee's main contention is that the Debtor has never filed a plan and disclosure statement in this aging Chapter 11 case. The Debtor responds that it is impossible for him to make any meaningful offer to creditors

until his tax liability is established,[10] and that only if this adversary proceeding is *successfully* concluded, will he be able to file a plan and disclosure statement.

The case is now over five years old. In a reorganization, when faced with disputed or unliquidated debt, the debtor in possession, *sooner or later,* is required to propose a plan in light of its current circumstances. In this case, the Debtor concedes that the worst possible scenario (judgment for the full amount of the IRS claim) would render *any* plan unworkable. Considering the passage of time (5 years), the limited nature of the Debtor's present options, and the continued pendency of the Citibank appeal before the District Court, we agree with and adopt the argument of the United States Trustee and conclude that cause has been shown for conversion. Any other decision would permit this (and most other "success on appeal" dependant Chapter 11 cases) to remain motionless and without time limitation in the Bankruptcy Court, while issues are litigated and appeals exhausted in other courts. We think that was never the intent of the Code drafters, or of their finished product. *See In re Mother Hubbard, Inc.*, 152 B.R. 189, 195 (Bankr.W.D.Mich.1993) (discussing the two purposes behind the 120-day exclusively period under 11 U.S.C. § 1121: (1) "it allows the debtor a reasonable time to obtain confirmation

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[10] Based upon the travel and prior proceedings in this bankruptcy case, it was our belief, early on, that the Debtor did not timely file a plan and disclosure statement because of the pending appeal of our Decision, *Citibank, N.A. v. Williams (In re Williams),* 159 B.R. 648 (Bankr.D.R.I.1993), wherein we: (1) avoided transfers of personal property to Debtor's former wife, as fraudulent conveyances; (2) determined that the debt owned to Citibank was nondischargeable; and (3) denied the Debtor's discharge. We now understand the position of Debtor to be that it is his tax problems that are holding things up. We note a pattern here, in that Mr. Williams' dischargeability problems and his tax exposure are being played, conveniently, one against the other, with transparent predictability.

of a plan without the threat of a competing plan;" and (2) "it endures creditors will not endure unreasonable delay after a debtor files chapter 11"); *In re River Bend-Oxford Assocs.*, 144 B.R. 111, 114 (Bankr.D.Md.1990) (Section 1121 "furthers the purpose of a rehabilitation, while recognizing that Chapter 11 is not a mechanism through which a debtor may operate indefinitely without attempting to reorganize").

In the event that the Debtor's substantive tax and/or dischargeability issues are finally resolved in his favor, and if it then appears that a reorganization would benefit Mr. Williams *and* his creditors, the Chapter 7 Trustee or the Debtor may file a motion to re-convert to Chapter 11. In the meantime, the reasonable window of opportunity for Mr. Williams to file his plan and disclosure statement in this case has long since expired.

Enter separate Judgments, consistent with this opinion.

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No. 98-956

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

Charles J. Cannon and William L. Blagg,
Petitioners,

v.

Lawrence G. Williams,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PHILIP S. ANDERSON*, PRESIDENT
AMERICAN BAR ASSOCIATION
750 N. Lake Shore Drive
Chicago IL 60611
(312) 988-5000

LAURIE WEBB DANIEL
ROBERT E. GOODING, JR.

* *Counsel of Record for Amicus Curiae*

QUESTION PRESENTED

Whether a court of appeals has jurisdiction to hear an appeal, arising out of a sanctions hearing, from a lawyer who is the subject of a judicial rebuke embodied in explicit and published findings of misconduct, regardless of whether there is an accompanying monetary sanction or whether the rebuke is labeled a "reprimand."

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INTEREST OF THE *AMICUS CURIAE*

The American Bar Association ("ABA") respectfully supports the petitioners' request for review in the interest of promoting procedural uniformity in the regulation of lawyer conduct in the federal courts. The ABA is a voluntary national organization of the legal profession, with over 400,000 members representing every state and territory and the District of Columbia. The ABA's membership includes prosecutors, public defenders, lawyers in private practice, legislators, law professors, law enforcement and corrections personnel, law students, and non-lawyer "associates" in allied fields.[1]

The ABA has a long standing interest in promoting uniformity of judicial decisions in general and of lawyer discipline in particular. Two of the ABA's constitutional purposes are "to promote throughout the nation ... the uniformity of legislation and of judicial decisions," and "to uphold the honor of the profession of law." American Bar Association Constitution and By-Laws §1.2. In furtherance of these goals, the ABA has appointed committees and commissions to evaluate and advise on the regulation of lawyer conduct. One of the stated purposes of this effort has been "to promote consistency in the imposition of

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[1] In accordance with Rule 37.6, the ABA hereby certifies that this *amicus curiae* brief is filed with the consent of both parties to this action. The ABA also certifies that no counsel for a party authored this brief in whole or part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it reflects the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption of the positions in this brief nor reviewed the brief prior to filing.

disciplinary sanctions for the same or similar offenses within and among jurisdictions."[2]

Specifically, the ABA Special Committee on Evaluation of Disciplinary Enforcement, chaired by former Supreme Court Justice Tom C. Clark, released a report in 1970 finding that "inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems."[3] The "Clark Committee" went on to issue a number of recommendations for the promotion of uniformity in lawyer disciplinary enforcement through standardized practice and procedure.

The ABA has continued to develop and refine the standards suggested by the Clark Committee. For example, it established the ABA Joint Committee on Professional Discipline, composed of members of the ABA's Judicial Administration Division and the ABA's Standing Committee on Professional Discipline. "The task of the Joint Committee was to prepare standards for enforcement of discipline in the legal community." In 1979, the ABA published the Joint Committee's work, *Standards for Lawyer Discipline and Disability Proceedings*. Subsequently, the ABA adopted Model Rules For Lawyer Disciplinary Enforcement (1985) and Standards for Imposing Lawyer

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[2] ABA, Standards for Imposing Lawyer Sanctions, Standard 1.3.

[3] ABA, Special Comm. on Evaluation of Disciplinary Enforcement, *Problems and Recommendations In Disciplinary Enforcement* 167 (1970).

Sanctions (1986). The ABA has continued to study the functioning of lawyer discipline systems in the 1990's.[4]

Although the ABA's standards and model rules have been directed primarily at state disciplinary systems, the ABA's interest in promoting uniformity in the regulation of lawyer conduct extends to the federal courts as well. At the request of Chief Justice Burger and the Judicial Conference of the United States, the ABA adopted Model Federal Rules of Disciplinary Enforcement. The ABA also participated in the "Special Study Conference of Federal Rules Governing Lawyer Conduct" (June 18, 1996), convened by the Committee on Rules of Practice and Procedure of the United States Judicial Conference.[5]

The ABA's interest in seeing that a lawyer's right to appeal findings of misconduct is handled in a uniform manner throughout the federal courts of appeals, therefore, is consistent with the ABA's historical involvement in the development of lawyer disciplinary procedures in the United States.

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[4] *See, e.g., Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement* (ABA, 1992) (the "McKay Commission") (evaluating existing disciplinary systems, assessing the implementation of the recommendations of the Clark Committee and making independent recommendations for the regulation of attorney conduct). For a thorough historical overview of lawyer discipline in this country, *see* Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 Geo. J. Legal Ethics 911 (1994).

[5] 12 Laws. Man. on Prof. Conduct (ABA/BNA) 11 d24.

REASONS FOR GRANTING THE PETITION

In recent years, the Supreme Court has granted certiorari to resolve disagreement over the appealability of orders in a variety of contexts.[6] It is not surprising that the Court granted review in these cases. Appealability issues are important. As the petitioners point out, "the right to appeal an adverse ruling stands as a 'fundamental element of procedural fairness as generally understood in this country.' ABA, Comm. on Standards of Judicial Admin., *Standards Relating to Appellate Courts* § 3.10 cmt. at 18 (1994)." Petition at 20. The Court likewise should grant certiorari in this case to resolve the present disagreement among the circuits over the appealability of published findings of lawyer misconduct.

In the ruling below, the First Circuit concluded that it lacked jurisdiction to review the "offending findings" because no sanction remained after the withdrawal of the monetary penalties. *In re Williams*, 156 F.3d 86, 90 (1st Cir. 1998). To reach this conclusion, the court distinguished the specifically re-published findings of misconduct, which the court held were not appealable, from an order imposing non-monetary "sanctions" in the form of a rebuke, which it said would be appealable. *Id.* at 91-92. The basis for the distinction, however, is purely formalistic; "offending

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[6] *E.g.*, *United States v. Jose*, 519 U.S. 554 (1996) (order conditionally enforcing summons final and appealable); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) (abstention order appealable); *Johnson v. Jones*, 515 U.S. 304 (1995) (denial of summary judgment on qualified immunity defense not immediately appealable); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249 (1992) (district court order reviewing bankruptcy court decision appealable pursuant to 28 U.S.C. § 1292(b)); *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989) (denial of motion to dismiss based on forum selection clause not immediately appealable).

findings" are appealable in the First Circuit if "expressly identified as a reprimand." *Id.* at 92.

The First Circuit's jurisdictional standard for reviewing findings of lawyer misconduct, which is based on the label attached to the order, conflicts with this Court's instruction that "[t]he label used by the District Court of course cannot control the order's appealability ..., any more than it could when a district court labeled a nonappealable interlocutory order as a 'final judgment.'" *Sullivan v. Finklestein*, 496 U.S. 617, 628 n.7 (1990). It also contrasts sharply with the approach taken by the Fifth Circuit in *Walker v. Mesquite, Tx.*, 129 F.3d 831 (5th Cir. 1997).

In *Walker*, the court held that "the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct." *Id.* at 832-833. The Federal Circuit and the Second Circuit similarly have allowed appeals from opinions that chastised a lawyer without imposing any monetary or other sanction. *Fromson v. Citiplate, Inc.*, 886 F.2d 1300, 1304 (Fed. Cir.1989); *Penthouse Int'l, Ltd. v. Playboy Enters., Inc.*, 663 F.2d 371, 373 (2d Cir. 1981).

In rejecting the approach that is now the law of the First Circuit, the Fifth Circuit noted that, as an appellate court, it has "a strong interest in hearing cases such as this because of [its] duty to assure that lawyers, as officers of the court, live up to their ethical responsibilities." *Id.* at 833 n.5. As observed in *Walker*, it is only natural that when a district court exercises its discretion to regulate lawyer conduct, "review of that exercise of power appropriately vests at the appellate level." *Id.* Otherwise, the district court's exercise

of power over the reputation of a lawyer would be exempt from appellate review.

The disagreement among the circuits on the question presented, however, runs even deeper than the conflict between the First Circuit and the Second, Fifth and Federal Circuits. The Seventh Circuit rejects the appealability of findings of misconduct unless accompanied by monetary sanctions regardless of the label attached to the order. *Clark Equipment Co. v. Lift Parts Mfg.*, 972 F.2d 817 (7th Cir. 1992); *Bolte v. The Home Insurance Co.*, 744 F.2d 572 (7th Cir. 1984). Thus, there is presently a three-way schism on the issue in the federal court system.

This conflict among the circuits will have a deleterious effect on the regulation of lawyer conduct in the federal courts. The conclusion of the Clark Committee is no less valid today than when that committee issued its report in 1970: "[I]nconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems."[7]

Although the problems caused by this lack of uniformity in federal procedure affect all lawyers who practice in the federal courts, they are especially acute for government and other lawyers who frequently appear in courts throughout the country. With the mobility of modern society, many lawyers enjoy a national practice. As recently observed by one commentator, a lawyer engaged in multi-forum litigation currently faces an arduous task when determining what standards and procedures govern his or her conduct. Katherine M. Lasher, Comment, *A Call For A Uniform Standard of Professional Responsibility In The Federal Court*

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[7] ABA, Special Comm. on Evaluation of Disciplinary Enforcement, *Problems and Recommendations In Disciplinary Enforcement* 167 (1970).

System, 66 U. Cin. L. Rev. 901 (1998). A uniform rule should govern the appealability of orders regulating lawyer conduct regardless of which federal court issues the order.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

PHILIP S. ANDERSON*, PRESIDENT
AMERICAN BAR ASSOCIATION
750 N. Lake Shore Drive
Chicago IL 60611
(312) 988-5000

LAURIE WEBB DANIEL
ROBERT E. GOODING, JR.

* *Counsel of Record for Amicus Curiae*

Supreme Court, U.S.
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BRIEF OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND THE FEDERAL BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DONALD B. VERRILLI, JR.
JENNER & BLOCK
601 Thirteenth St., N.W.
Washington, DC 20005
(202) 639-6000

MICHAEL J. TUTEUR*
EPSTEIN BECKER & GREEN
75 State Street
Boston, MA 02109
(617) 342-4000

Counsel for Amici Curiae

January 9, 1999

**Counsel of Record*

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IN THE
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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND THE FEDERAL BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION

The National Association of Assistant United States Attorneys ("NAAUSA") and the Federal Bar Association ("FBA"), *amici curiae*, respectfully submit this joint Brief in support of Petitioners Charles J. Cannon's and William L. Blagg's Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.[1]

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[1] Pursuant to Rule 37.6, no part of this brief was authored by counsel for the petitioners, and all monetary contributions for the preparation and submission of this brief have or will come from *amici* except to the extent that counsels' services have been provided *pro bono publico*.

Pursuant to Rule 37.2(a), all parties to this action have given their written consent to the filing of this brief. Copies of the consents have been filed simultaneously herewith.

INTERESTS OF AMICI CURIAE

NAAUSA is a non-profit corporation organized under the laws of the District of Columbia, with its principal place of business in Alexandria, Virginia. A professional, non-governmental association, NAAUSA's primary objective is the promotion and protection of the career and professional interests of Assistant United States Attorneys. NAAUSA serves as a resource for policy makers in the executive and legislative branches and helps educate them with regard to issues that concern NAAUSA's members. Currently, NAAUSA has over 1,000 members with representatives in every United States Attorney's office.

The FBA is a nationwide organization with approximately 15,000 attorney members. The majority of association members have at some time in their professional careers served in the public sector. Approximately 2,800 members are presently government attorneys, and the remainder are in private practice or other pursuits. The association's members share a common interest in federal practice.

Both NAAUSA and FBA have strong interests in the resolution of the issue of whether attorneys may appeal published decisions determining that counsel has committed serious professional misconduct. As Judge Lynch (joined by Chief Judge Torruella and Judge Lipez) noted in her dissent from the vote against rehearing *en banc*, "[b]eing branded unethical or incompetent by a federal judge can essentially destroy a lawyer's career." App. 36a. Yet if the original majority decision is upheld, a "lawyer attempting to pursue a client's interests zealously may, if faced with an arbitrary judge

or a judge who has an erroneous view of the facts, end up with a blot on his or her record that will never be erased – unless an appeal is possible to correct the problem." App. 36a-37a.

Similarly, FBA and NAAUSA are concerned that decisions like those of the courts below may exert an inappropriate chilling effect on zealous advocacy. The right of appeal is crucial to establishing, through court review, the proper line between zealous advocacy and sanctionable conduct.

NAAUSA and FBA believe they are in a special position to aid this Court in understanding and appreciating the importance to, among others, government and public service litigators of a right to appeal judicial findings of serious professional misconduct, where no monetary penalty has been imposed (or where, as here, the monetary sanction was subsequently removed for judicial error). As explained in the argument below, *amici* believe that, ironically, judges may be more reluctant to impose monetary sanctions on government and public interest attorneys because of the courts' recognition that those attorneys are, relatively speaking, lower-paid, salaried employees. At the same time, judges may be more prone sharply to chastise government attorneys as a surrogate for reining in real or perceived executive branch misconduct. The result may be that government and public interest attorneys receive more stinging *verbal* opprobrium from the courts – unappealable, according to the First Circuit's majority opinion – while private practitioners who receive modest, but less professionally damaging, monetary sanctions can automatically seek review.

REASONS FOR GRANTING THE PETITION

FBA and NAAUSA agree with the petitioners that the issue before this Court is of fundamental importance to every attorney appearing in federal court. As associations

representing thousands of such attorneys – including those who practice in the First and Seventh Circuits, where appellate jurisdiction for non-monetary sanctions, as a practical matter, now does not exist – *amici* believe it is essential for there to be meaningful appellate review of public, judicial condemnations of lawyers' conduct. Especially in the case of government and public interest lawyers – who often must assert controversial positions or represent unpopular parties, and who may be *less* likely to receive monetary punishments – judicial review is the *only* means by which a potentially career-limiting condemnation may be rectified.

Faced with this issue, three other circuits, as well as four of the eight circuit judges who considered this matter in the proceedings below, have agreed that appellate jurisdiction was appropriate in circumstances such as these. Moreover, even within the First and Seventh Circuits -- the two circuits that have denied appellate jurisdiction -- the courts have failed to agree on a single standard of appealability. *Compare* App. 13a ("[w]ords alone may suffice if they are expressly identified as a reprimand") *with Clark Equipment Co. v. Lift Parts Mg. Co.*, 972 F.2d 817, 820 (7th Cir. 1992) (absence of monetary sanction precludes any appeal). Thus, for NAAUSA's and FBA's members, whether a published finding of misconduct will remain forever unreviewable depends almost exclusively on geography.

In addition, the jurisdictional issue is of exceptional importance because it affects the reputation and public perception of the judiciary for fairness. In *amici's* view, the lower courts were insufficiently sensitive to, in the words of one United States District Judge, the magnitude of "the sting of public criticism delivered from the bench." William W. Schwarzer, *Sanctions Under the New Rule 11 -- A Closer*

Look, 104 F.R.D. 181, 201 (1985), quoted in *Thomas v. Capital Security Services*, 836 F.2d at 878.

A finding of intentional misconduct on the part of an attorney is serious business. As the Ninth Circuit has recognized, "published opinions chastising [counsel] by name" constitute "serious sanction." *United States v. Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992). Indeed, "one's professional reputation is a lawyer's most important and valuable asset." *Walker v. City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997). Because "[a] lawyer's reputation for integrity, thoroughness, and competence is his or her bread and butter," *FDIC v. Tekfen Construction & Installation Co.*, 847 F.2d 440, 444 (7th Cir. 1988), "criticism delivered from the bench . . . can . . . damage a lawyer's reputation and career." *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 878 (5th Cir. 1988). Sanctions "act as a symbolic statement about the quality and integrity of an attorney's work -- a statement which may have tangible effect upon the attorney's career." *Simmerman v. Corino*, 27 F.3d 58, 64 (3d Cir. 1994). *See generally*, Andrew L. Kaufman, *Judicial Ethics: The Less Often Asked Questions*, 64 Wash. L. Rev. 851, 864 (1989) ("[p]ublic criticism of a lawyer in an opinion in which the court does not undertake the job of fact-finding with all the procedural safeguards involved in a disciplinary proceeding may destroy or severely damage a lawyer's reputation").

The seriousness of judicial declarations of attorney misconduct is amplified in modern times by the emergence of computer-assisted legal research databases. For example, the decisions of the bankruptcy and district courts here will forever be responsive to a Westlaw or Lexis search for the name of either Cannon or Blagg. Whether such a search is undertaken by a prospective employer, an opposing counsel,

or a trial judge, these opinions will remain readily accessible stains on the careers of these attorneys. Appellate review may not always provide a complete remedy, but an opinion of a higher court will presumably be similarly responsive to a search for the attorney's name, and may thus serve to ameliorate the damage.

The court of appeals held that there could be no sure remedy for the damage visited upon Cannon and Blagg, no matter that the determinations of misconduct were incorrect, and no matter how procedurally defective the methods by which they were reached. That ruling will be viewed, at least by the many lawyers made familiar with this case (through, among other things, FBA's and NAAUSA's involvement in it), as a failure of justice. The panel majority's approach therefore ill serves the interest of the judiciary in maintaining the public reputation of fairness in judicial proceedings. *E.g.*, *New York Central R.R. Co. v. Johnson*, 279 U.S. 310, 318 (1929); *United States v. Atkinson*, 297 U.S. 157, 169 (1936); *United States v. Olano*, 507 U.S. 725 (1993).

If the First Circuit's majority decision is allowed to stand, FBA and NAAUSA are concerned that, as Judge Rosenn pointed out in his panel dissent, judges within that Circuit (as well as those in the Seventh Circuit) could "escape appellate review of an unfounded or intemperate censure merely by refraining from labeling the public reprimand as an order or decree." App. 29a. Regardless of a judge's actual intent, confidence in the judiciary may be eroded if attorneys are given reason to suspect that a judge has evaded appellate review by condemning an attorney in a published opinion but avoiding the formal label "reprimand."

Equally important, a published decision condemning an attorney by name for serious professional misconduct is no less a sanction than one that adds the formalistic label:

"reprimand." As the Fifth Circuit indicated in *Walker v. City of Mesquite*, 129 F.3d at 832, a "declaration by a court that counsel is an unprofessional lawyer" is indeed a more serious sanction than a small monetary fine. *See also Martin v. Brown*, 63 F.3d 1252, 1260 (3d Cir. 1995) (observing, as part of a ruling allowing an interlocutory appeal from monetary sanctions not yet fixed as to amount, that "[i]n the overall context of this case, the dollar amounts of the sanctions imposed and the potential liability for the unquantified sanction are insignificant in comparison to their stigmatic effect").

NAAUSA and FBA are particularly concerned that the consequences of a rule precluding appeals from findings of attorney misconduct may fall disproportionately on government and public interest attorneys. First, it appears that allegations of attorney misconduct, particularly against the government, have become a routine litigating tactic in the past few years, directed not at exacting reimbursement for expenses out of the pockets of government attorneys but rather at procuring default judgments (as sought in the instant case), preclusion, or other strategic advantages. *Cf. Starcher v. Correctional Medical Systems, Inc.*, 144 F.3d 418, 425 (6th Cir. 1998) (*cert. pending*) ("requests for sanctions are increasingly used more for tactical purposes than to seek redress for true discovery abuses"). Second, courts seem to believe that they have a special obligation to police government misconduct (and perhaps they do). Accordingly, as the number of allegations increases (which may not be at all reflective of an increase in instances of actual misconduct), judges are more frequently drawn into disputes in which occasional judicial error is inevitable. At the same time, many judges realize that government attorneys are salaried workers whose advocacy and heavy caseloads are not driven by pecuniary interests. For these reasons, many judges may

be more reluctant to impose monetary sanctions on government attorneys and, for reciprocal reasons, they may be more likely to resort to public criticism. Yet they may not even think to label their reprimands as such. Ironically, then, it may be that the government attorney who is sharply punished by a verbal reprimand may never be permitted an appeal, whereas the private practitioner – who is, perhaps, merely fined a small amount – may pursue his case up the line. Many of these same factors apply to public interest lawyers as well.

Finally, there is always a tension or conflict between the threat of sanctions and zealous advocacy. The availability of appellate review is a critical component in maintaining the proper balance. That balance is badly skewed if lawyers' professional reputations can be destroyed summarily by errant trial judges with no recourse to appellate review, no matter how unsubstantiated are the charges and how defective are the procedures by which the judge arrives at the findings underpinning the determination of misconduct.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for writ of certiorari, the National Association of Assistant United States Attorneys and the Federal Bar Association, *amici curiae*, respectfully submit that the petition should be granted.

Respectfully submitted,

DONALD B. VERRILLI, JR.
JENNER & BLOCK
601 Thirteenth St., N.W.
Suite 1200
Washington, DC 20005
(202) 639-6000

MICHAEL J. TUTEUR*
EPSTEIN BECKER & GREEN
75 State Street
Boston, MA 02109
617-342-4000

Counsel for Amici Curiae

**Counsel of Record*

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No. 98-956

In the Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES J. CANNON AND
WILLIAM L. BLAGG, PETITIONERS

v.

LAWRENCE G. WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record
LORETTA C. ARGRETT
Assistant Attorney General
GILBERT S. ROTHENBERG
THOMAS J. CLARK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether an attorney who is publicly rebuked in findings entered in a sanctions proceeding may appeal the order containing those findings in the absence of a monetary or other formal coercive sanction.

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INTEREST OF THE UNITED STATES

This case addresses a question of importance on which the courts of appeals are divided. Whether an attorney who is publicly rebuked in findings entered in a sanctions proceeding may appeal the order containing those findings in the absence of a monetary or other formal coercive sanction is a question of recurring importance to the United States. As this Court has noted, "the Government is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity." *United States* v. *Mendoza*, 464 U.S. 154, 159 (1984). The government's lawyers appear in court more frequently than attorneys for

any other litigant. Because it is not unusual for disgruntled litigants to vent their frustrations at government counsel, the United States has a strong interest in ensuring that the professional reputations of its attorneys—such as the petitioners in this case—are not harmed by unreviewable and unremediable public rebukes set forth in formal findings entered in sanctions proceedings.

STATEMENT

1. Petitioners Cannon and Blagg are federal employees who, as attorneys, represent the United States in tax litigation (Pet. App. 93a). In a published order entered on April 14, 1995, the bankruptcy court imposed fines of $750 on each of the petitioners in connection with their representation of the United States in a tax dispute in that court (*id.* at 88a, 98a). Although the order was entered in response to a sanctions motion filed by the debtor, the court ordered the fines to be paid to the clerk of the court (*id.* at 98a). The court further decreed that petitioners were not to seek reimbursement for the fines from the United States (*ibid.*).

In findings entered in the published order that imposed the fines, the bankruptcy court concluded that Blagg had an "attitude problem," that some of his testimony was "pure baloney," that he had done "his best * * * to obstruct the Plaintiff's discovery," and that his conduct was "intentional, unprofessional, and unjustified" (Pet. App. 94a, 95a). The court similarly found that Cannon had shown a "disdain for the Federal and Bankruptcy Rules of Procedure, his adversaries, and Courts alike," and that his conduct in this case "places his performance and credibility at about the same level as that of his colleague, William Blagg" (*id.*

at 97a). The court stated that the "egregious conduct of the Defendant's agents" constituted "government lawyer misbehavior" and concluded that their "actions were specifically calculated to impede Plaintiff's attempts to obtain discovery material to which it was clearly entitled" (*id.* at 96a-97a & n.9). The court stated that the personal fines that it imposed on petitioners were necessary "to discourage these and other government agents from engaging in 'big brother' abuses of private sector litigants" (*id.* at 97a-98a).

In a second published opinion dated October 24, 1995, the bankruptcy court vacated the $750 fine imposed on Blagg. Since Blagg was not a counsel of record in the case, the court acknowledged that it lacked personal jurisdiction to assess a fine against him (Pet. App. 69a, 78a). In vacating the fine, however, the court stated that its "findings and conclusions regarding Mr. Blagg's conduct and demeanor remain intact" (*id.* at 78a).

At the same time, the court altered its order with respect to Cannon. The court concluded that, under Rule 37(b) of the Federal Rules of Civil Procedure, the $750 fine that it had entered against Cannon in response to the debtor's motion for sanctions should be paid to the debtor rather than to the Clerk of the Court. The court reiterated its prior directive that Cannon was not to seek reimbursement for this fine from the government (Pet. App. 86a).

2. The district court accepted jurisdiction over petitioners' appeal under 28 U.S.C. 158(a)(3) and vacated the $750 sanction against Cannon (Pet. App. 40a, 68a). The court noted that a discovery sanction may not be imposed under Rule 37(b) unless a discovery order issued pursuant to Rule 37(a) has been violated by the party to be sanctioned. Because no pertinent discovery order issued under Rule 37(a) had been violated in this

case, the sanctions imposed by the bankruptcy court were invalid (Pet. App. 63a-64a).

The district court declined, however, to vacate the findings and the public reprimand of petitioners in the bankruptcy court orders. The district court justified the reprimand as an exercise of the bankruptcy court's "inherent * * * ability" to "discipline the attorneys appearing before it" (Pet. App. 65a). According to the district court, "[f]undamentally, what the bankruptcy court heard was substantial evidence that Cannon and Blagg, among others, made promises that they did not keep" (*ibid.*). The district court concluded that "[w]hether conduct is in violation of a standing discovery order or in breach of an informal agreement, the evidence before the bankruptcy court fully supports the finding that appellants' conduct was 'intentional, unprofessional, and unjustified'" and "justif[ied] the bankruptcy court's finding of bad faith" (*id.* at 67a). In thus "sustain[ing]" the findings of the bankruptcy court, the district court concluded that "[p]ublishing specific findings of bad faith is but one remedy the bankruptcy court had available." Pet. App. 65a-66a (citing *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 263 (1988)).

3. A divided panel of the First Circuit declined to reach the merits of petitioners' appeals (Pet. App. 2a-16a).[1] Because the monetary sanctions against both Blagg and Cannon had been vacated, the court held that there was no appealable final order left for review (*id.* at 8a). The court concluded that unless the lower court "expressly identified" its findings of bad conduct

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[1] The courts of appeals have appellate jurisdiction over district court decisions in bankruptcy cases under 28 U.S.C. 158(d) and 28 U.S.C. 1291. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 251-254 (1992).

by an attorney "as a reprimand" (*id.* at 13a), the court of appeals would have no jurisdiction to review the underlying findings.[2] In thus declining to accept jurisdiction, the court noted that the Fifth Circuit has concluded that an attorney may appeal findings of misconduct entered in a disciplinary proceeding even if a formal sanction was not entered in such a proceeding (*id.* at 14a n.6 (citing *Walker* v. *City of Mesquite*, 129 F.3d 831 (1997))). The court, however, "respectfully decline[d] to follow" the Fifth Circuit rule (*ibid.*).

Petitioners filed a timely petition for rehearing with a suggestion for rehearing en banc, which the court denied (Pet. App. 35a-38a). Three of the six active judges dissented from the denial of en banc review. The dissenting judges noted that "[a] published reprimand is a punishment that is in many cases far more serious than the imposition of monetary sanctions" (*id.* at 36a) and that, if an appeal were not permitted in this context, the aggrieved lawyer may "end up with a blot on his or her record that will never be erased" (*id.* at 37a). The dissenting judges concluded that it is "especially inappropriate" to make appealability turn on the empty formalism of whether the trial judge has "expressly identified" its formal public rebuke of an attorney as a "reprimand" (*ibid.*). They further noted that mandamus relief is available only in "exceedingly narrow" circumstances and therefore cannot function as

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[2] On the merits, petitioners sought to dispute the basic findings of the bankruptcy court and to contend that they had been denied due process in the issuance of sanctions without sufficient particularized notice of the conduct alleged to be sanctionable or the standard by which their conduct would be judged. See, *e.g.*, *Ted Lapidus, S.A.* v. *Vann*, 112 F.3d 91, 96 (2d Cir.), cert. denied, 118 S. Ct. 337 (1997).

a suitable "check on judges who may be too free to issue unwarranted reprimands" (*id.* at 38a).

DISCUSSION

In holding that an attorney may not obtain appellate review of a public censure issued by a federal trial court unless the court accompanied that censure with a coercive sanction or "expressly identified" the censure "as a reprimand" (Pet. App. 13a), the decision in this case directly conflicts with decisions of other circuits on an issue of substantial recurring importance. Review by this Court is therefore warranted.

1. The "most precious asset" of attorneys "is their professional reputation." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 413 (1990) (Stevens, J., concurring in part and dissenting in part). By issuing formal findings that discredit a lawyer's reputation, a federal judge may inflict harm on an attorney that is far greater than the merely transient injury that results from monetary sanctions. As the three dissenting members of the court of appeals stated in this case, "[b]eing branded unethical or incompetent by a federal judge can essentially destroy a lawyer's career" (Pet. App. 36a).[3]

This Court concluded in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 263 (1988), that such a public "branding" of an attorney in a published reprimand is a permissible sanction for violation of a rule of practice. Courts have consistently recognized that such published findings that reprimand or chastise a lawyer constitute a "serious sanction" (*United States* v. *Isgro*,

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[3] "A lawyer's reputation for integrity, thoroughness and competence is his or her bread and butter." *FDIC* v. *Tekfen Constr. & Installation Co.*, 847 F.2d 440, 444 (7th Cir. 1988).

974 F.2d 1091, 1099 (9th Cir. 1992), cert. denied, 507 U.S. 985 (1993)) that is more injurious than any modest monetary fine. See *Martin* v. *Brown*, 63 F.3d 1252, 1260 (3d Cir. 1995) ("the dollar amounts of the sanctions imposed * * * are insignificant in comparison to their stigmatic effect"); *Walker* v. *City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997) (rejecting "out of hand" the idea that "an attorney has more of a reason and interest in appealing the imposition of a $100 fine than appealing a finding and declaration by a court that counsel is an unprofessional lawyer prone to engage in blatant misconduct"); Pet. App. 36a ("Reputational damage alone may be worse for a lawyer than any monetary sanction."). The courts of appeals are in disagreement, however, as to whether an attorney may appeal a decision that contains formal findings of censure unless the lower court has, in addition, imposed some monetary or other coercive sanction against the attorney.

Most of the courts of appeals that have addressed the issue have held that a lawyer may appeal a lower court's public declaration that the lawyer has engaged in professional misconduct. For example, in *Sullivan* v. *Committee on Admissions & Grievances*, 395 F.2d 954 (D.C. Cir. 1967), the court of appeals allowed an appeal from a decision of the district court that had found that an attorney had violated several ethical rules but which, because the ethical issue was one of first impression, had not imposed any formal sanctions against the attorney. *Id.* at 956. In an opinion by then-Judge Burger, the attorney was permitted to appeal from that portion of the district court's opinion "reflect

ing unfavorably on his professional conduct." *Ibid.* As the court of appeals explained (*ibid.*):

> [T]he District Court has determined that Appellant was guilty of proscribed conduct and this determination plainly reflects adversely on his professional reputation. In a sense Appellant's posture is not unlike that of an accused who is found guilty but with penalties suspended. We conclude this gives him standing to appeal.

Other courts of appeals have similarly permitted lawyers to appeal from a public judicial censure of their professional conduct even in the absence of a monetary or other coercive sanction. In *Walker* v. *City of Mesquite*, 129 F.3d at 832, a government attorney was permitted to appeal when he had been "reprimanded sternly and found guilty of blatant misconduct." The court stated that such a public reprimand of the attorney (*id.* at 832-833)

> must be seen as a blot on [his] professional record with a potential to limit his advancement in governmental service and impair his entering into otherwise inviting private practice. We therefore conclude and hold that the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct.

Nothing in the *Walker* opinion suggests that the findings of misconduct in the trial court's opinion had been formally or "expressly identified as a reprimand" (Pet.

App. 13a).[4] Instead, the Fifth Circuit reasoned that the trial "court order finding professional misconduct" by itself constituted a sufficient public reprimand to permit appellate review even in the absence of "a finding of monetary liability or other punishment" (129 F.3d at 832-833).

Similarly, in *Fromson* v. *Citiplate, Inc.*, 886 F.2d 1300, 1304 (Fed. Cir. 1989), the court of appeals allowed an attorney to appeal even though the only "sanction" that had been entered was the trial court's finding of professional misconduct.[5] The court specifically noted in allowing the appeal that there was "no judgment imposing any monetary or other sanction on him." *Ibid.*

The Seventh Circuit, to the contrary, has held that a public judicial reprimand of an attorney in a written

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[4] In *Walker*, the trial court had entered an order making findings of serious professional misconduct by three Department of Justice lawyers and inviting those attorneys to respond before a final order concerning sanctions to be imposed. After further submissions, the trial court announced at a hearing that it was deleting the findings against two of the three lawyers, but the court refused to vacate the prior opinion or otherwise exonerate one of the lawyers. The court then entered a final order in which it reaffirmed the findings of misconduct against that lawyer but stated that no further action would be taken. The Fifth Circuit treated the trial court's written findings, by themselves, as constituting the court's "reprimand." See 129 F.3d at 832.

[5] In the *Fromson* case, the Federal Circuit relied on *Penthouse International, Ltd.* v. *Playboy Enterprises, Inc.*, 663 F.2d 371, 373 (1981), in which the Second Circuit allowed an attorney (along with his client) to appeal a formal sanction of dismissal that had been entered by the district court for discovery abuse and misrepresentation of material facts. The court in *Penthouse* upheld the formal sanction of dismissal and remanded the case for "further consideration" of "whether reasonable costs and expenses should be awarded" to the defendant. *Ibid.*

decision does *not* provide a basis for appellate review unless a monetary or other coercive sanction has been imposed. In *Bolte* v. *Home Insurance Co.*, 744 F.2d 572 (1984), the Seventh Circuit stated that, if such appeals were allowed, "a breathtaking expansion in appellate jurisdiction would be presaged." *Id.* at 573. The court concluded that, "especially in an age of congested appellate dockets, * * * we do not think they are within the scope of section 1291." *Ibid.* The court applied that same reasoning in holding that it lacked jurisdiction to consider a similar appeal in *Clark Equipment Co.* v. *Lift Parts Manufacturing Co.*, 972 F.2d 817 (7th Cir. 1992).

In the present case, the court of appeals chose a course that falls between the conflicting rules of the Seventh Circuit in *Bolte* and of the Fifth and Federal Circuits in *Walker* and *Fromson*. Recognizing that "[s]anctions are not limited to monetary imposts," the First Circuit concluded in the present case that "[w]ords alone may suffice if they are expressly identified as a reprimand" (Pet. App. 13a). The court held, however, that an attorney may not appeal formal findings of misconduct entered by the trial court if that court does *not* label its public censure "as a reprimand" (*ibid.*). This intermediate rule adopted by the First Circuit in this case has been adopted by no other court. It thus further splinters the circuits on this recurring issue.

In adopting its unique rule, the court of appeals expressed a concern that, if attorneys were permitted to appeal from anything less than a formal censure that the trial court had expressly labeled as a "reprimand," the result "would be tantamount to declaring open season on trial judges" (Pet. App. 12a). But lawyers in the District of Columbia, Federal, and Fifth Circuits

have been permitted to appeal from a trial court's public findings of professional misconduct, and there has been no "open season on trial judges" in those circuits. Moreover, contrary to the fears expressed by the Seventh Circuit in *Bolte*, 744 F.2d at 573, there has also been no "breathtaking expansion" of litigation concerning the public censure of lawyers in these circuits. As the dissenting judges in this case explained in refuting a similar concern expressed by the majority below (Pet. App. 38a):

> Any lawyer appealing a reprimand takes the risk that [the court of appeals], reaching the merits, will agree that the sanction is justified—thus giving the sanction far more force than it would have had if it had come from a trial judge unendorsed by a reviewing court. Accordingly, the lawyer's self-interest dictates that an appeal be taken only in cases in which the sanction is particularly damaging to the lawyer's reputation and particularly undeserved.

When a court publicly rebukes a lawyer, the censure inflicts a lasting harm to the lawyer's professional standing and reputation. That harm is palpable whether or not the public rebuke is formally labeled, or "expressly identified," as a "reprimand" by the lower court. The line that the court sought to draw between appealable and non-appealable orders is not related either to whether fundamental harm was inflicted on the attorney or to the question whether a "final decision" was entered by the lower court. When, as in the present case, the order was entered as the court's final decision in a sanctions proceeding that is collateral to the main action, the attorney injured by that order should be permitted to appeal. Whether that final

decision contains a sanction that the lower court formally labeled and "expressly identified as a reprimand" (Pet. App. 13a) or, instead, contains formal findings of professional misconduct that (however labeled) represent a "sanction" for professional misconduct, the injury in fact suffered by the attorney from that final decision on this collateral matter supports appellate jurisdiction.[6]

We do not advocate a rule that expands the jurisdiction of the courts of appeals by ignoring the requirement of a "final decision[]" under 28 U.S.C. 1291. Instead, it is our view that this fundamental requirement of appellate jurisdiction is satisfied when (as in the present case) a published reprimand that functionally operates as a sanction is issued as a final decision in a sanctions proceeding.

2. The recurring question presented in this case has created confusion among the lower courts and has resulted in no fewer than three different rules in the courts of appeals. Both the majority and the dissenting judges recognized that the jurisdictional issue presented in this case is an "important question" of federal law that has "exceptional importance" (Pet. App. 2a, 36a).[7] Review by this Court is warranted to resolve the

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[6] As Judge Rosenn stated in dissent in this case, "the substance of the published reprimand and the circumstances attending its declaration by the court give it all of the characteristics of an order imposing a sanction" (Pet. App. 16a).

[7] The possible availability of mandamus is not a suitable alternative to appeal. Mandamus is "a drastic remedy" to be applied only in the most egregious circumstances "amounting to a judicial usurpation of power." *In re Chambers Dev. Co.*, 148 F.3d 214, 223 (3d Cir. 1998). The standard for review in a mandamus case is far "narrower than in an ordinary appeal." *In re Sandahl*, 980 F.2d 1118, 1120 (7th Cir. 1992). As the First Circuit noted in *In re*

continuing conflict among the courts of appeals on this important and recurring jurisdictional issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
GILBERT S. ROTHENBERG
THOMAS J. CLARK
Attorneys

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Bushkin Associates, Inc., 864 F.2d 241, 245 (1989), "mandamus does not lie to control run-of-mine misuses of judicial discretion." The utility of mandamus as a remedy is further undermined by the fact that "it is within a court's discretion to refrain from issuing the writ even when the requirements for mandamus are technically satisfied." *In re Chambers Dev. Co.*, 148 F.3d at 223.